

THE
Indian Excess Profits Tax Act, 1940

Being

An exhaustive commentary of the Act, giving in
detail the English law and case-law on the
subject, together with a digest of the
same and the relative provisions
of the Income-tax Law

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Do.	...	Madras	...	M.
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Allahabad	...	All	<i>e.g.</i> 1920 All.30.	
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Indian Appeals	...	I. A.		
<i>English and Foreign.</i>				
Commercial Cases	Com. Cas.	Law Times	L. T.	
Justice of the Peace	J. P.	New Zealand Law Reporter		
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Law Reports	A. C. Ch.	Solicitors' Journal	S. J.	
	K.B., Q.B.	Times Law Reporter	T. L. R.	
Law Reports Indian		Tax Cases	T. C. or Tax Cas.	
„ Appeals	I. R. Ind. App.	Annotated Tax Cases	A. T. C.	

PREFACE.

The introduction in India of the Excess Profits Tax and the consequent legislation relating thereto, in the shape of the Excess Profits Tax Act, 1940, called for a commentary on the provisions of the Act, almost all of which have been taken, in some places *verbatim*, from the English law, as embodied in the recent United Kingdom Finance Act, (2) of 1939. Some of the provisions are of a decidedly intricate nature and, though drafted by expert English draftsmen, still needed an elucidation in the light of the previous law and case-law on the subject as it existed in 1915-19.

The main and important sections and provisions of the Act, e.g. those relating to Standard Profits, Deficiency, Inter-connected Companies, Computation of Profits etc., have been exhaustively dealt with and explained by means of apt and appropriate illustrations. The main provisions of the Income-tax Law made applicable to the Act have also been introduced in order to make the book self-contained. A digest of the English and Indian case-law relating to Excess Profits Duty, as enacted in 1915-1919, both in United Kingdom and in India, has also been made a part of the book to render the compilation more helpful. The English and Indian case-law, though already noted in its proper place in the commentary, has also been added in the shape of digest in order to enable a full and complete exposition of the cases in the light of the detailed facts thereof. Both the United Kingdom and the Indian Excess Profits Duty Act, of 1915 and 1919 respectively and the United Kingdom Excess Profits Tax Act (2) of 1939, as also the Indian Income-tax Act 1922 (Amended 1939), have been given in a separate Part, in order to facilitate easy reference.

A comparative table of the present Indian Excess Profits Tax Act, 1940, indicating the provisions of the Bill as introduced in the Indian Legislature, as amended by the Select Committee and as finally improved by the Assembly and assented to by the Governor-General has been given, with a view to explain the various changes made and to give an idea of the principles

underlying these changes. An exhaustive Subject Index of all the Parts adds to the utility of the Book.

No attempt has been spared to make the book self-contained, self-explanatory and useful and it is confidently hoped it will render such useful assistance to all parties concerned as it is intended to do.

It is indeed a point of great regret that the Legislature have, apparently in the hurry of affairs, failed to give illustrations under important and difficult provision of an Act which relates to a very important branch of a heavy taxation. We hope the illustrations given by us are quite in accord with the provisions for which they stand.

At the end, I have to express my gratitude to Mr. C. L. Varma for his kind assistance rendered in the course of the compilation of the book.

Delhi, 15th May 1940.

Author.

Excess Profits Tax Act, 1940.

PART I.

INTRODUCTORY.

General :—The imposition of 'Excess Profits' Tax by the State in cases of emergency has been justified both from the administrative and economical point of view. It is a method of equalizing the burden of taxation on the nation during exceptional times, such as the war.

It also prevents the concentration of wealth in the hands of a few, specially when many in the country have to sacrifice even their ordinary necessities of life at times of emergency.

Excess Profits Tax is not a new tax, not new to India either. The same tax was levied in the United Kingdom, by the Finance Act (2) of 1915, during the last Great War of 1914—1919 and, in India, by E. P. D. Act (10) of 1919.

On the outbreak of the present War in Europe, in September, 1939, the same tax has been levied by a legislation in the United Kingdom, Finance Act 2 of 1939. It has been levied in India by the Excess Profits Tax Act, 1940.

At the time the Bill relating to the legislation was introduced in the Indian Legislature, it was considered that the imposition of the tax was comparatively earlier than it was at the time of the last War. While in India, at least, it was considered to be decidedly a 'premature' step, the levy of this tax in England, could not at all be said to be premature, as, though the war in Europe was actually announced in September, 1939, preparations,—or to put it mildly, precautions—for War had been going on since many years before September, 1939. If the introduction of the tax was, at all, premature, or was considered to be so, so far as India was concerned, it might obviously be ascribed to England's experience of the last War. On this point, the Hon'ble the Finance member pointed out in the Assembly that at the time the 1919 Act (Excess Profits Duty) was introduced, after the War, it was said it was too late, as the profits sought to be taxed had already been made and appropriated or dissipated. He asked if it was too late after the War,

and 'premature' now, when was the time for it? In justifying the introduction of the bill at this stage, the Hon'ble the Finance Member observed:—"Once the justice and desirability of the Bill was accepted it was infinitely better to introduce it as early as possible".

Some strong opposition and passionate protest against the bill was made and exception taken to the introduction of this exceptional measure to add to State coffers, without first feeling and expressing to the country in facts and figures the details and need for the money to be received by such a sweeping measure, in particular, as it was considered in all business quarters and by almost all the business magnates in the country that the measure would, at the time, tend to cripple the various industries in India, already struggling to exist and may extinguish many.

Expression was, in some quarters, given even to the idea that it was not intended to be a mere War measure but a 'permanent measure'. The expression at the outset of the "Statement of Objects and Reasons" that "the outbreak of war, while it has necessitated greatly increased expenditure by the Government on defence and other services" was, it was said, to be ignored as if not being there. The entire measure was dubbed as a death-blow to the Indian industries.

Another accusation laid at its door was that the bill chose a period for determining standard profits which was a period of general depression. It was tantalized also as being inopportune, having been introduced without any proof that Excess Profits had at all accrued and if so, to what industries in particular. The legislation was said to be pernicious as it affected not only all industries without any exception but indirectly affected agriculture also, ultimately. It was further considered that the measure would affect not only the limited number of assesses as stated by the Hon'ble the Finance Member in the Assembly, but a thousand of shareholders in companies also.

The Government, it was alleged, did not, before introducing the tax, look into the insuperable difficulties that confronted those who were to supply, in the matter of getting raw materials.

While, as stated in para 3 of the Statement of Objects and Reasons, the necessary provisions relating to the computation of profits and capital, followed closely the provisions relating to Excess Profits imposed in the United Kingdom by the Finance Act, 2 of 1915, the Government had, it has been alleged, failed to appreciate the distinctly wide differences existing in the conditions of the two countries.

The English measure, it was pointed out, was the culmination and consolidation of various other measures adopted under "The National Defence Contributions". Each and every measure in the United Kingdom was taken after giving a full hearing to the case of each and every industry, large and small. Moreover, it was pointed out that long preparation for war, before it actually started in September, 1939, had the effect of stimulating many industries, which profiteered already and therefore, this measure of taxation had the justification in United Kingdom of the actual accrual and existence of abnormal profits to many industries before it was levied. That was not, it was said, the case in India.

It was pointed out that the Dominions of Canada also adopted the measure of Excess Profits Taxation, but Canada had exempted several industries from this tax. Then, the Canadian Bill, it was pointed out, had several redeeming features. It proposed to tax excess profits for 1940-41 and had the one great advantage that the tax was graduated in relation to the paid up share capital *plus* Reserves and the profits were computed after the normal tax (Corporation Tax) was deducted. The Indian measure, it was pointed out, lacked all these features. As against the redeeming features of the Canadian legislation, the Indian Legislation on the subject aimed at taxing profits which were compared with the profits of lean years.

The above and similar further objections were taken to the Bill before it was referred to Select Committee. Most of these were met by the Hon'ble the Finance Member in his speech introducing the Bill.

In introducing the Excess Profits Act Bill in the Assembly the Hon'ble the Finance Member in dwelling on the moral and fiscal justification of the Bill said that it rested on the principle

of social justice first, but that he would take his main stand on the concrete fiscal footing, namely, that a country, engaged in war, was inevitably involved in additional expenditure mainly on defence, and that it was, therefore, just that in raising additional revenues necessary to cope with this additional expenditure the Government should tax increased profits which, like the increased expenditure, arose out of the war. That, he declared, was a principle which no right thinking man would controvert. To resort to general taxation in these conditions, he said, would be to aggravate inequality.

The Bill was ultimately referred to a Select Committee and many of the provisions thereof objected to as stringent were modified. The minimum amount of taxable profits was raised from 20,000/- (twenty thousand) to 30,000/- in the Select Committee and ultimately to 36,000/- [Section 6 (4) of the Act]. The chargeable accounting period gave up the period from 1st April, 1939 and commenced from 1st September, 1939. Above all, by an amendment to the Preamble of the Act, a periodical review of the enactment by the Legislature was assured. Profits from Life Insurance business were exempted from taxation under the Act by the Select Committee, mainly on the ground that such profits could not be determined annually but were subject to triennial or quinquennial valuation and that there was a reasonable presumption that life insurance business would not make any additional profits out of war conditions.

The other forms of insurance were, of course, not affected by the above exemption.

Principle of Excess Profits Tax :—As already stated above, the main principle underlying the levy of Excess Profits tax by the Government is to find funds to meet the extraordinary expenditure to be incurred during times of emergency of war. During the abnormal times of war, abnormal purchase of certain articles has necessarily to be made by the Government and those dealing in such articles make abnormal profits, as a consequence. It is, therefore, but fair and equitable that persons carrying on such businesses as make these abnormal profits should share the same with the Administration.

EXCESS PROFITS TAX ACT, 1940.

And, as it is well nigh impossible to determine whether the abnormal profits sought to be hit by the tax arose directly out of war and war alone all excess profits from business (excepting a few) are assessed to tax during the war conditions, irrespective of a scrupulous scrutiny as to whether the excess in profits of a certain business is the direct result of war and war alone. Such a sharp line between war profits and other abnormal profits accruing during the war conditions prevailing at the time, it is impossible to draw and as such, excess profits arising from business during the war conditions are generally made subject to this tax, exempting those only as cannot reasonably be expected to make abnormal profits.

While introducing the E. P. T. Bill in the Assembly the Hon'ble the Finance Member pointed out that the imposition of the tax rested on social justice. And the question that the Indian Excess Profits Tax Act, 1940, would not only tax war profits but would draw in normal profits also, arose during the course of general discussion on the Bill in the Assembly. "I come now to the most important issue before us, viz., that this Bill is intended to get for Government a share in the war profits, profits due to the war, but it is not intended to get for Government a share in the normal profits. That is what the Statement of Objects and Reasons says,—that they want a share in the war profits. Now I will give you many instances where Government will get a share in the normal profits. This Government, while they talk of social justice, and rightly too perhaps, are out to get, over and above the income-tax, a portion of the ordinary profits such as would have accrued had there been no war. I will give you two or three instances. A company enlarges its business, increases its out-turn, hoping to get very good profits out of that increased outturn. It spends lakhs, crores of money in machinery, in extra buildings, in the expansion of its business. The machinery was ordered out long before the war was thought of, the buildings were constructed, say, before the war broke out, the machinery also came into operation before the war broke out. But the profits from that increased outturn will accrue in the chargeable accounting period. What is the allowance allowed by this Bill? A petty amount of percentage on the increased capital. Is not that

taking a part of the profits not due to the war? By all means, take your profits on that outturn which is due to the war, but do not take such part of the profits which would have accrued from that extra expenditure had there been no war. Then, take the case of a windfall to a company, a firm or an individual. I am going to give you a concrete instance. There may be claims by a firm against another firm, by one company against another company. The case may go to a Court of law,—to the High Court. The decision may go in favour of the plaintiffs, and the Court may award a certain amount of money to the plaintiffs. That money may not be capital, the Income-tax Department may hold that it is income and, say, your income should go up by that amount. Nothing to do with the war; merely, to do with certain legal claims made by one party against another, which may benefit one party at the cost of the other party. Such income will go into the chargeable accounting period, it will not be in the standard period and Government will promptly seize 50 per cent of it. There is no provision in the Bill for such a case. (*Sir Cowasji Jehangir*). How would you define war profits? (*Mr. M. A. Jinnah*).

Now, the main ground on which this Bill is pressed is this—that the Government have got to incur extra expenditure because of war conditions and that expenditure has got to be met and what more equitable source of taxation than the war profits. Putting it on that basis, I do not think that one can find any serious objection to that. It is quite clear that if Government have got to incur legitimate expenditure owing to war conditions, that expenditure has got to be met. And I quite agree that it is very difficult to suggest a more equitable source the first question I would like to draw the attention of Honourable Members to it is this that the Select Committee and the Honourable the Finance Member will bear in mind that the first proposition of his is a general one,—that profits arising out of war conditions should be taxed. Now, are they going to make any distinction between profits which will arise directly and solely due to war, and profits which will arise indirectly because of the war? I do not know whether I have made my position clear. Take a big contractor. He is not concerned with any business except to supply to the Army Department,

solely for war purposes. Now he makes, we will say, an excess profit. I do not know how you are going to ascertain his excess profit; but if you do, any how you will get fifty per cent of it. Take an ordinary trade or normal business, which also makes excess profits due to the war conditions. Are these two to be considered on the same footing and are they both to pay on the 50 per cent. basis? (*Mr. M. A. Jinnah*)

An excess profit tax is a much more equitable way of raising money than an increase in income-tax. The principle that the State should get a part of the profits accruing from the war is correct and should be accepted by business men in India. The tax is both inevitable and in principle unexceptional (*Dr. R. D. Dalal*).

The point of taxing Excess Profits not arising directly out of war was explained by the Hon'ble the Finance Member in his reply, thus:—In times of war profits arise not merely from the direct supply of the materials of war, but from a large number of transactions which are inseparably connected with that essential features of a war time situation. There is a general quickening of the whole tempo of economic activity, and that has its roots in the imperious demand for the necessities of war. It is not possible,.....to make philosophic distinctions between the degree of relation which certain industries have to the facts of war and that of others. I am prepared to admit that there may be cases, in which it may be possible to establish a complete isolation of the fortunes of the business from the economic circumstances of the war. That is a matter on which I should be very happy to have the advice and assistance of the Members of the Select Committee. But I cannot hold out the hope that I would be prepared to go into a meticulous discrimination between industries which supply directly the needs of war and those which supply the needs of those which supply the needs of war.

"If what is meant is that there will be a certain category of profits which cannot be proved by a strict process of demonstration to be due to the war and that the tax will be levied on such profits, I agree that that is the case. But I am not

prepared to admit that is necessarily a serious criticism of the measure. The principle of this Bill is not the taxation of profits which can be demonstrated to be due to the war; it is the taxation of excess profits arising in war time and in war conditions, because it is based on a principle of priority of taxation, namely, that the cost of the additional defence measures should be borne in the first instance by those who in the conditions of war find themselves not worse off but better off. Now, I myself believe that the vast majority of people who find themselves better off during the war are better off because of the war. The economic conditions of modern states are so organically interconnected that it is, in my opinion, impossible for so powerful a factor as war to be applied to the economy of state without affecting every aspect of it; and I attach very little importance to theoretical or metaphysical case which is so frequently stated of a business which is making profits in the war but without any connection whatever with the war. However, even if I granted that such a case can exist, what does it amount to? It amounts to this. You have to raise revenue in order to meet the additional expenditure which is thrust upon you and which you have to assume in war time. In looking round for the sources of your new taxation, will you refrain from taxing definite war profits because it can be argued that any measure which is devised to tax war profits will also possibly affect a small number of persons who, though they are making additional profits during the war, are perhaps not making additional profits because of the war?''
(*Sir Jeremy Raisman*).

It would, thus, appear that, though the principle of Excess Profits Tax Act is, *in esse*, to tax mainly such excess profits as arise out of war alone, it has incidentally to tax such other excess profits also as might arise out of and during the war conditions, no "meticulous distinction" being possible to be made between the two. The principle such a tax has been well recognized all over.

Nature & Scope of Tax :—(1) Excess Profits Tax, though introduced (both in England and India) without reference to any limit of time, is, never-the-less, "clearly of the nature of a temporary tax related to abnormal conditions and likely to be

terminated when those conditions are considered to be no longer in existence"

All the same, Excess Profits Tax, though leviable usually only in the conditions prevailing during existing hostilities, is leviable on profits arising out of certain businesses only, and on such profits as are in excess of the profits of the pre-war standard period and have accrued during the chargeable accounting period. Like income tax, the tax is not chargeable on income, profits or gains from whatever source arising. It is different from income tax in that it is chargeable, not on all or 'total income' but only on profits arising from certain businesses. And it is only the excess of profits calculated in a way (as indicated in the Act) that is chargeable. The assessment of the Excess Profits Tax is on the profits of the business and on the person owning the business or entitled to the profits*

Since Excess Profits Tax is concerned with the profits arising from business alone, which is also the case under the English law, income from offices and employments under the latter law, therefore, is outside the scope of Excess Profits Tax. The same would be the case in India, where profits of every business, any part of which made during the chargeable accounting period is chargeable to Income Tax by virtue of Section 4 (1) (b) (i) & (ii) & (c) of Section 4 Income tax Act, 1922, are within the scope of the tax (Section 5). Just as under Income Tax Act, capital profits are excluded.

The question whether any activity or set of activities does or does not amount to 'business' is essentially one of fact, there being no determining test of a universal application. This is so also under the English law¹ Just as in England,² so in India, control of business is the test in case of business carried outside British India.

* Per Sir W. Ayling Kt. C. J. & Contt Trotter and Ramesam J. J. in C. I. T. Madras v. N. Govindasami Naidu 1 I.T.C 174 (176).

(1) Cape Brandy Syndicate v. Commissioner Inland Revenue. 12 T. C. 358 (369). J. & R. O'Kane & Co., v. Commissioner Inland Revenue 12 T. C. 808 (850).

(2) Ogilvie v. Kitton 5 T. C. 335.

Profits of a profession carried on by an individual or individuals in partnership, which depend wholly or mainly on his or their personal qualifications are outside the scope of the tax.

The holding of investments or property by an incorporated company or society is, however, a business within the scope of the tax.

Again, all businesses carried on by one person shall be taken to be one business and not different businesses separately assessable [Second Proviso to Section 2 (5)].

This is in consonance with the provision on the point in the (English) Finance Act (2) of 1939, which supersedes the provisions in the earlier Excess Profits Duty Act of 1915 and which was followed in India also under departmental instructions ³. These provisions now stand superseded.

Measure of Excess Profits :—Excess Profits Tax, as its very name indicates, is levied on the amount of profits of the chargeable accounting period that are in excess of the standard profits. What is chargeable accounting period and how are standard profits to be determined are stated in Sections 2 (6) and 6 of the Excess Profits Tax Act, 1940.

If the Excess Profits do not exceed thirty six thousand rupees, no question of liability to Excess Profits Tax arises at all [Section 6 (4)].

HISTORY OF EXCESS PROFITS TAX ACT:—

1. In The United Kingdom :—(1) Tax on excess profits was first levied in the United Kingdom, at the time of the previous Great War of 1914-1919, by the Finance Act (2) of 1915. Under the said Act, the Tax was levied as "Excess Profits Duty". How the profits chargeable with the said Duty, the pre-war standard profits and the capital employed in the business were to be computed formed the subject of the Rules contained in Schedule Fourth (Parts. I, II and III) of the said Act. The

(3) Commissioner Income-tax, Madras v. N. Govindasami Naidu
1 I. T. C. 174. • •

operation of the provisions of the 1915 Finance Act was extended by the various subsequent Finance Acts, some new provisions relating to the Duty being added. The last one of these Acts so extending the provisions was the Finance Act, of 1919.

(2) On the outbreak of the existing hostilities in Europe, Finance Act (2) of 1939 was hurried through the Parliament, having been passed without being as closely examined as it would have been under normal conditions. This time it has been passed under the title of 'Excess Profits Tax' and not 'Excess Profits Duty' and although the Act, as it stands, contains several new features that did not find place in the 1915 Act, yet it bears a 'family resemblance' to the former Excess Profits Duty Act. Hence, the case-law under the latter may well be studied with advantage with reference to the provisions of the present Excess Profits Tax Act of 1939.

The main provisions relating to the Excess Profits Tax are contained in Part III (Sections 12—22), Finance Act (2) of 1939, while Schedule 7 contains the rules. It supersedes the Armament Profits Duty introduced by Part III, Finance Act, 1939 which, together with the Ninth Schedule to that Act is repealed by Section 20 Finance Act (2) of 1939.

Though the Excess Profits Tax under the 1939 Act is modelled on the lines of the Excess Profits Duty under the 1915 Finance Act, there are many points of differences between the two taxes, in particular as to the determination of the standard profits. Some of the differences between Excess Profits Duty under the 1915 Finance Act and Excess Profits Tax under the 1939 Finance Act are very obvious. For instance :—

1. By Section 39, exception (a) Finance Act 1915, husbandry profits were expressly exempted from Duty, but there is no such exemption under the Excess Profits Tax.

2. With regards to Banking business, investment income of the latter is, under Excess Profits Tax, to be included in the profits (Schedule 7, Part I) Para 6 (i) Finance Act (2) of 1939, but a Bank's investments are not to be excluded in computing the amount of capital employed in the business* (Part II para,

Schedule 7), Finance Act (2) of 1939. Under the Excess Profits Duty Act, 1915, Banks' investments were not to be included in computing the capital employed in business. (Part III, Para. 2, Schedule IV).

3. Under the Excess Profits Duty Act, the tax-payer had the option to adopt the statutory percentage instead of pre-war standard, if that was to his benefit, [Section 40 (2) Finance Act (2) 1915]. Under the present Excess Profits Act (2) of 1939 he has no such option.

4. Under the Excess Profits Duty legislation there was no such provision as now exists under the Excess Profits Tax Act (1939) for adjustment of standard profits in tax-payers' favour by an increase of the same by the Board of Referees, where the Board is satisfied that such profits are less than could reasonably be expected. See Section 13 (7).

There was some provision for exceptional cases [(Section 40 (3) and Schedule IV Part 11, Paras 3, Finance Act 1915] but not so wide discretionary powers as are now vested in the Board of Referees.

(5) Statutory percentage could, under certain circumstances, be varied under the Excess Profits Duty Act, 1915, (Section 42). This is not possible under the Excess Profits Tax Act, 1939.

(6) Capital employed in trade or business in the standard period, which brought in profits during the chargeable accounting period is not to be allowed for under the Excess Profits Tax Act now [Section 13 (3)] as was the case under Excess Profits Duty Act, 1915 [Section 41 (4), 1915 Act].

(7) Borrowed capital was to be ignored in computing the capital employed in business under the Excess Profits Duty Act. It is to be taken into account now with certain restrictions [Schedule 7, Part I, paras 4 and 6 (3), Part II, Para. 37].

(8) The provisions as to chargeable accounting period differ now from those under the Excess Profits Duty Act, 1915,

2. In India. (1) An Act for levying Tax on Excess Profits on the lines of the English Finance Act (2) of 1915, was passed in India, towards the end of the last Great War of 1914-1919. Its provisions were mainly similar to the United Kingdom Act of 1915. This Act was in force for a very short period and hardly any complications arose in the administration of it in this country, the provisions of the same being meagre and simple. It was in force when the Income-tax Act of 1918 was being worked for income-tax purposes in India by the Revenue Officers.

(2) The present Excess Profits Tax Act, 1940 has been enacted on the lines of the English Finance Act (2) of 1939, not only mostly and mainly but entirely, some of the provisions of the English law having been bodily taken from the Finance Act (2) of 1939. For this reason it was dubbed in the Indian Legislative Assembly as a 'blind copy' of the English law on the subject, without any reference to the conditions prevailing in India which so widely differ from those in the United Kingdom. On this point the explanation of the Hon'ble the Finance Member was this :—

" I have been told.....that this Bill is a slavish imitation of the English measure and, therefore, shows a complete lack of knowledge of Indian conditions and a complete bankruptcy of imagination in the Finance Department. I admit that this Bill follows very closely the provisions of the existing English Statute—I plead guilty to that charge, but I would say in defence that it surely must be admitted on all hands that the Inland Revenue machinery of the United Kingdom is a much more efficient instrument for producing a measure of this character than any one which we can call, that it was a reasonable procedure to start with a measure which had been drafted by such competent hands and in relation to so complex a situation as is found in the United Kingdom. We did indeed endeavour to see what obvious changes were called for in order to make it suitable to the conditions of India, and in particular we inserted one clause which is not to be found in the English measure in which we took to ourselves some power to deal with

hard cases other than those which come before the Board of Referees ; but we were given no credit, I notice, for that departure from the English Statute ”

The Indian Excess Profits Tax Act, 1940, thus follows closely the provisions of the Finance Act (2) of 1939 which imposes Excess Profits Tax in the United Kingdom. The principal differences are due to the differences in the income-tax systems in the two countries. For example it has been possible in India to follow the income-tax profit more closely than in the United Kingdom because in the latter country the basis year for assessment can vary between the current year basis and the previous year basis. For this reason, in the United Kingdom, instead of taking the simpler course of following the income-tax profits for the purposes of computing standard profits, the calendar years 1935, 1936 and 1937 have been taken. These correspond fairly closely to the “previous years” for income-tax for the year 1936-37, 1937-38 and 1938-39.

The other main difference between the United Kingdom Excess Profits Tax and that levied in India relates to machinery, but the differences are more a matter of form than of substance. The United Kingdom tax is entrusted to the Commissioners of Inland Revenue which correspond roughly speaking to the Central Board of Revenue in India, and the normal income-tax appeal procedure in the United Kingdom is also followed. Just as in the United Kingdom there is a right of reference to a Board of Referees, a corresponding right has been given in the Indian Act also.

Excess Profits Duty under 1919 Act and Excess Profits Tax under the 1940 Act, distinction between :—The Excess Profits Duty Act of 1919 followed in India the old Excess Profits Duty formerly charged in the United Kingdom and contained in general the same defects as the corresponding United Kingdom Duty. Perhaps the most important difference, however, between the 1919 Duty and that in the 1940 Act is the exemption from Indian excess profits duty formerly granted to all concerns paying England Excess Profits Duty. The 1940 Act makes no such exemption but does contain the double

taxation relief provisions which the incidence of both taxes make absolutely necessary. Another difference, is in the machinery provided for administering the tax, the 1919 Duty being administered by the Collectors who in those days also administered the income-tax.

Excess Profits Act, 1940 imposes a tax of 50% on the excess of business profits made after the 1st September, 1939 'over standard profits'. The main points covered by the Act are :—

- (1) Business liable to Excess Profits Tax *i. e.*, to which the Act applies. (Section 5).
- (2) Computation of standard profits (Section 6).
- (3) Computation of capital (Schedule 11, Rules).
- (4) Computation of profits for Excess Profits Tax purposes (Schedule 1 Rules)
- (5) Relief in case of deficiency of profits (Section 7).
- (6) Cases of succession and amalgamation of businesses (Section 8).
- (7) Inter-connected companies (Section 9).
- (8) Artificial transactions (Section 10).
- (9) Double taxation Relief (Section 11).
- (10) Penalties (Section 16).

These, taken together with the administrative portion and provisions as to appeals (Section 17, 18), revision (Section 19) and rectification of mistakes (Section 20) almost exhaust the entire provisions of the Act. Businesses the profits of which are subject to tax are all those which, after 1st September, 1939, make profits in excess of Rs. 36,000 per annum, where they are liable to income tax [under Section 4 Income tax Act, 1922, amended 1939 Sections 5 & 6 (4)]. Exemptions under Section 4, Income-tax Act 1922, are maintained

as exemptions for Excess Profits Tax purposes also, while profits from Life Assurance Businesses have also been exempted (Section 4 proviso). Professions are included in business except where the profits depend wholly or mainly on the personal qualifications of the owner and the business is not concerned mainly with the making of commercial contracts.

"Standard profits are determined with reference to the profits of standard period" determined differently according to the age of the businesses [Section 6 (2)]. In the case of a business not in existence before 31st March, 1936, standard profits shall at the option of the person carrying on the business, be calculated by applying the statutory percentage [proviso 2 to Section 6 (1)] Profits from Burma made during the time when Burma formed part of India are to be excluded in computing the standard profits [Section 6 (5)]. In case of deficiency of profits, relief shall be allowed by adjustment, or repayments, the principle of 'carrying forward' being applied to the deficiency amount till it is exhausted. [Section 7 (b)].

Successions and amalgamations of businesses are to be ignored for purposes of the Act. The change would be ignored and a new business deemed to have been set upon a change (Section 8) losses and profits of subsidiary companies shall be treated as those of the principal company [Section 9 4)]. Fictitious and artificial transactions are not to be recognized so long as they are intended to reduce profits taxable under the Act (Section 10).

A number of companies will be liable to the excess profits tax charged in the United Kingdom and also to that charged in India, and provision is, therefore, made for the granting of double excess profits tax relief. National Defence Contribution is to be taken as Excess Profits Tax paid in United Kingdom and similar relief is to be allowed in respect of it also. The relief is available in case of Excess Profits Tax paid in Indian States also. [Section 11 (1), proviso]. Excess Profits Tax is allowed as a deduction in arriving at the profits for income-tax purposes, i.e., income-tax is charged on the net amount remaining after deducting the excess profits tax which has been charged.

This exhausts the principal provisions for determining the amount of Excess Profits Tax payable. There is very little to be said for the administrative side. The normal procedure will be an assessment by Excess Profits Tax Officer, (under Section 14, after notice under Section 13) Profits escaping assessment may also be assessed at any time within five years (Section 15). Normally, an appeal will lie to an appellate Assistant Commissioner (Section 17) and a second appeal, only in case of imposition of penalty or enhancement of assessment or penalty, will lie to the Commissioner (Section 18). The latter is also given the power, as under the Income tax Act, to call for records and pass proper orders therein, where necessary (Section 19). Mistakes may be rectified by the Commissioner within four years (Section 20).

The Act also contains the usual provisions for penalties for failure to furnish returns or statements or for making false statements. It is to be noted in particular that the provisions as to the submission of returns voluntarily, made compulsory by the 1939 (Amending) Income-tax Act, do not find place in the Excess Profits Tax Act.

Withal the fact that some of the provisions of the Act have been modified in favour of the tax-payer by the Select Committee, a lot would, of course, depend upon how the Act is interpreted and administered. The provisions of the Act, based as they are the United Kingdom law, will have ultimately to be interpreted mainly in the light of the latter, as contained in the judicial decisions of that country under the Finance Act, 1915.

Excess Profits Tax Act, No. XV 1940.

An Act to impose a tax on Excess Profits arising out of certain business.

Whereas it is expedient to impose a tax on excess profits arising out of certain businesses in the conditions prevailing during the present hostilities :

It is hereby enacted as follows :—

1. (1) *This Act may be called the Excess Profits Tax Act, 1940.*

Short title,
extent and
commence-
ment.

(2) *It extends to the whole of British India.*

(3) *It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.*

Preamble :—A preamble always prefaces all Acts of the Legislature. It has its uses, the main one being the indication of the object and purpose of the particular piece of legislation. The preamble, it has been said, is not a part of the Act itself but a mere recital.¹ It indicates the scope of the Act and furnishes a key to its construction,² and may be referred to in case of ambiguity.³ Where the enactment is not ambiguous, the preamble cannot override it.⁴ A preamble has other uses also, for instance, it may be used to restrain the general enactments when it is necessary to do so for the sake of convenience⁵.

The preamble of this Act has been amended by the Select Committee, with a view that it should contain a definite

1. Brindaban Chander Sircar Choudhry v. B. C. Dey Choudhry. 13. Bombay L. R. 408; Collector of Trichinopoly v. Lakhaman L. R. 1; J. A. 268 (A. C.)

2. Nga Hong v. The Queen; 7 M. I. (27).

3. *Ibid*; Ganesh v. Krishnejji 14 B. 387 Chuma v. M. Fakirud-din, 2 M. 822.

4. *Ibid*.

5. Karnnakar Mahali v Niladhro Chaudhry 5 Bombay L. R. 652

reference to the real aspect and object of this piece of legislation. The Committee observe :— "Having regard to the proposed objects of the Bill, to tax additional business profits which accrue as a result of the conditions prevailing during the war, we consider that the *preamble* should contain a definite reference to this aspect of the proposed legislation. We have, therefore, amended the *preamble* to indicate clearly that this new taxation is related to war conditions... ."

The Excess Profits Tax Act has as its object the imposition of tax, of course, in addition to the usual income-tax, on excess profits, arising from certain businesses.

The term "Excess Profits" is not defined by the Act, though the terms, 'profits' and 'standard profits' have been defined in Section 2. Method for determination of profits is laid down in the First Schedule (see notes thereunder).

The term 'excess,' has to be taken in its ordinary sense as meaning 'abnormal' or 'extra' profits. Rule 1, Schedule 1, together with the provisos to the said rule, lay down how "profits" are to be computed for the purposes of this Act, to be assessed as "Excess Profits" (See under Rule 1, Schedule 1 *post*).

The term "certain businesses" indicates that the Act is not applicable to all businesses. Section 5 *post* points out to what businesses the Act applies and to what is it not applicable. See notes under Section 5 *post*.

The English law exempts from the applicability of Act 2, Finance Act, 1915, being the English Excess Profits Duty Act, such businesses as are enumerated in Schedule 11 to the said Act.

Income from professions is exempted under the English Law Section 39 (c) Finance Act 2 of 1915 and according to the said Section the exemption applies to the profits of any profession depending mainly on the personal qualifications of the person and not an investment of capital. There is abundant English case-law on the point.

In, *The Commissioner of Inland Revenue v. Peter*

McIntyre, Ltd.,⁶ the First Division of the Court of Sessions, the Lord President (Clyde) pointed out:—"The exemption is of the profits of any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure—or very little—is required. As has been seen, the present case is concerned with the profits earned by a company, in the business carried on by it. That business consists in performing for its clients the services of an auctioneer, valuator, and estate agent. Such a business is, in part at least, what is known as a profession. This is common ground between the parties, and was the basis of the arrangement and instruction above referred to. But the profits of the company cannot enjoy exemption unless they are dependent mainly on the personal qualifications of the person by whom the profession is carried,—namely, the company itself. I do not doubt that the word "person" where it occurs in Section 39, may mean either an individual or a corporate person (see *Moorhead and Co. v. Inland Revenue*, 1924 S. C. 345); but the "person" by whom the profession is carried on must obviously be identical with the "person" on whose personal qualifications the profits are mainly dependent. In the present case the corporate person by whom the profession is carried on—namely the company,—has no personal qualifications upon which the profits can be said to be mainly dependent, or indeed dependent at all..... I put nothing upon the second condition—as to whether no capital expenditure or only small capital expenditure is required. So far as I can see, the present case raises no question about that.... It follows from what has been said that the profits of a profession may, or may not, fall within the statutory exemption, according as the person who carries it on is an individual on the one hand, or a corporate person on the other hand. For a professional business may be carried on by a company as well as by an individual, but, if by a company, it is difficult to see how the profits can be dependent on the company's personal qualifications, for the simple reason that a company is incapable of personal qualifications. That is all, as I understand, that was decided by

6. 12 T. C. 1003 (at p. 1013)=(1927) Sess. cas. 166=(1927) Sc. L. T. 63.

Mr. Justice Rowlatt in *William Esplen, son and Swainston, Ltd. v. The Commissioners of Inland Revenue*, (1919) 2 K. B. 731, and I respectfully think his decision was right.

(*Per Lord Sands.*) "The Section provides that where the profits are dependent mainly on the personal qualifications of the person by whom the profession is carried on, the exemption shall hold."

In *Currie v. The Commissioners Inland Revenue* ⁷ assessee carried on the business of the Income Tax Payers' Appeal Agency and did the work of an accountant. He was not a Chartered Accountant, nor a member of any organized professional body. He specialized in income-tax, assisting people in income-tax matters. For his services in connection with income-tax matters, he frequently charged a percentage of the amounts discharged or recovered from the Revenue authorities by way of repayment. Little or no capital was required to carry on his business.

It was held that assessee was not carrying on a profession exempt under Section 39 (c).

In *Durant's case* (*Durant v. Commissioner Inland Revenue* ^{7-a.}) assessee acted in respect of insurance business as follows:— "Upon receipt of the necessary instructions from any person wishing to effect an insurance against fire he surveys the premises to be insured and makes plans thereof; he advises as to any structural alterations the carrying out of which would, in his opinion, result in a reduction of premiums, and in conjunction with architects superintends the carrying out of such alterations; he draws up schedules of particulars of properties to be insured and draft policies; he advises as to the company or companies with which and the amount for which the insurance should be effected; and he negotiates with company or companies selected, and carries matters through to their final conclusion."

⁷. 12 T.C. 245, 247, 260, 261.

(^{7-a.}) 12 T.C. 245 (249, 250, 256)—(1920) 1 K.B. 801 (1921) 2 K.B. 382—37 T.L.R. 371.

He acted as a surveyor, valuer and appraiser only in connection with his insurance work.

It was held that he was not carrying on a profession. The profession of a journalist and editor may, however, be carried on as separate from publication business, and the profits of the two may be separable for Excess Profits Duty purposes.

This was so held in *Commissioners of Inland Revenue v. Maxse* ⁸.

Obviously, the same exemptions apply to India also. This has been made clear in Section 2 (5) defining the term "business: see notes under Section 2 (5) below. When the Excess Profits Duty was imposed at the time of the last war, the then Excess Profits Duty Act of 1919 contained a schedule, (Schedule of excepted business, which was based on the English provisions of the 1915 Finance Act) ^{8-a}.

Section 1. (1) Title:—The "title" of an Act has also its uses like the "preamble". It is an accepted practice to refer to the title of an Act in construing the doubtful portions thereof. ¹ A title of an Act, however, would not restrict the enacting portion thereof when there is no ambiguity ².

Section 1 (2): Section 1 (2) lays down the area to which the Act applies. The Act applies to the whole of British India. The term "British India (as distinct from "India", defined by Section 3 (27) General clauses Act, of 1897, has been defined by in Section 3 (7) General Clauses Act, 10 of 1897, to mean," all territories and places within Her Majesty' Dominion which are, for the time being, governed by Her Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor General of India.

Section 1 (3): An Act of Legislature generally comes into force on the day it is passed or on the date from which it

8. 12 T. C. 41 (49 50 56,58,59,60, 61,62, 63).

8-a *Kaladan Suratee Bazar Co.* In re. 1 I.T.C. 50 (52). •

1. *R. B. Sundar Das v. Collector of Gujrat.* 1 I.T.C. 189.

2 *Mohd. Ali v. Assadunnisa Bibi* Suppl. Vol. B L. R. 774.

is expressly indicated by an enactment to operate ³.

Usually, an Act act has no retrospective effect, unless expressly provided for to operate. Matters of substance *e. g.* a right to appeal, cannot be presumed to have a retrospective effect, though alterations in matters of procedure may be presumed to have such an effect.

2. *In this Act, unless there is anything repugnant in Definitions. the subject or context,—*

(1) "*accounting period*" in relation to any business means—

(a) *where the accounts of the business are made up for successive periods of twelve months, each of such periods ;*

(b) *in any other case, such period as the Excess Profits Tax Officer may determine :*

Provided that in determining any accounting period under sub-clause (b) the Excess Profits Tax Officer shall have regard to the period, if any, which is, or has been, determined as the previous year for that business for the purposes of the Indian Income-tax Act, 1922 ;

(2) "*Appellate Assistant Commissioner*" means a person appointed to be an Appellate Assistant Commissioner of Excess Profits Tax under Section 3 ;

(3) "*average amount of capital*" means the average amount of capital employed in any business as computed in accordance with the Second Schedule ;

(4) "*Board of Referees*" means a Board of Referees appointed under Section 3 ;

(5) "*business*" includes any trade, commerce or manufacture or any adventure in the nature of trade, commerce or

3. *Sh. Attaur Rehman v. Commissioner Income-tax Punjab* 1984 I. T. R. 889; 7 I. T. C. 400, *Delhi Cloth and General Mills Co. v. Commissioner of Punjab* 1928 P. C. 242 2 I. T. C. 489.

manufacture or any profession or vocation, but does not include a profession carried on by an individual or by individuals in partnership if the profits of the profession depend wholly or mainly on his or their personal qualifications unless such profession consists wholly or mainly in the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts :

Provided that where the functions of a company or of a society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this definition to be a business carried on by such company or society :

Provided further that all businesses to which this Act applies carried on by the same person shall be treated as one business for the purposes of this Act :

(6) "chargeable accounting period" means—

(a) *any accounting period falling wholly within the term beginning on the 1st day of September, 1939, and ending on the 31st day of March, 1941, and*

(b) *where any accounting period falls partly within and partly without the said term, such part of that accounting period as falls within the said term ;*

(7) "Commissioner" means a person appointed to be a Commissioner of Excess Profits Tax under Section 3 ;

(8) "company" means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession or of a law of an Indian State, and includes any foreign association whether incorporated or not which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act ;

: •

(9) "*deficiency of profits*" means—

- (i) *where profits have been made in any chargeable accounting period, the amount by which such profits fall short of the standard profits ;*
- (ii) *where a loss has been made in any chargeable accounting period, the amount of the loss added to the amount of the standard profits ;*

(10) "*director*" includes any person occupying the position of a director by whatever name called and also includes any person who—

- (i) *is a manager of the company or concerned in the management of the business ; and*
- (ii) *is remunerated out of the funds of the business ; and*
- (iii) *is the beneficial owner of not less than twenty per cent of the ordinary share capital of the company ;*

(11) "*dividend*" has the meaning assigned to the expression in Section 2 of the Indian Income-tax Act, 1922 ;

(12) "*Excess Profits Tax Officer*" means a person appointed to be an Excess Profits Tax Officer under Section 3 ;

(13) "*income*" has the meaning assigned to the expression in Section 2 of the Indian Income-tax Act, 1922 ;

(14) "*fixed rate*" in relation to dividends on share capital, other than ordinary share capital, includes a rate fluctuating in accordance with the maximum rate of income-tax ;

(15) "*Inspecting Assistant Commissioner*" means a person appointed to be an Inspecting Assistant Commissioner of Excess Profits Tax under Section 3 ;

(16) "*loss*" means a loss computed in the same manner as, for the purposes of this Act, profits are to be computed ;

(17) "*person*" includes a Hindu undivided family ;

(18) "*prescribed*" means *prescribed by rules made under this Act* ;

(19) "*profits*" means *profits as determined in accordance with the First Schedule* ;

(20) "*standard profits*" means *standard profits as computed in accordance with the provisions of Section 6* ;

(21) "*statutory percentage*" means—

(a) *in relation to a business carried on by a body corporate (other than a company the directors whereof have a controlling interest therein), eight per cent per annum* ;

(b) *in relation to any other business ten per cent. per annum* ;

Provided that in relation to any decrease of capital the statutory percentage shall be in all cases six per cent :

Provided further that where the business was commenced on or after the 1st day of July, 1938, the foregoing percentages shall be increased from eight, ten and six per cent. to ten, twelve and eight per cent. respectively ;

(22) "*written down value*" has the meaning assigned to that expression in sub-section (5) of Section 10 of the *Indian Income-tax Act, 1922*.

Section 2:—Section 2 is the general defining or interpretation clause, as it is also called. The marginal note to Section 2 is simple enough, indicating that the Section contains "definitions" of certain terms requiring explanation with reference to their use in the Act. The marginal note to Section 2 of the *Income-tax Act 1922 (Amended, 1939)* is also the same.

It is a well-recognized principle of legislation that usually, the "definitions" given in Act of Legislature are meant for that particular Act and are not meant to be imported into any other enactment of the Legislature.

For this purpose, Rules and Notifications are included in the Act. That is to say, the meaning or interpretation of a particular term or expression, used in a Rule or a Notification under a particular Act, would also be the same as are assigned to it by the defining Section of the Act itself. Of course, the definitions given in the General Clauses Act supplement those given in a particular Act, unless otherwise provided.

Unless there is anything repugnant in the subject or context :—These words almost invariably preface a defining section of an Act and are obviously necessary, being a saving clause, meant to help in the construction of the definition or the meaning of the terms given in the Section. Instances there may be available where a particular word or term, though defined by the defining Section as meaning one thing, may have another sense in a particular Section of the Act "*Means*" and *Includes* :—The two terms invariably used to define particular terms in an Act, are, "includes" and "means."

There is a distinction between these two terms. The term "includes" is wider than the term, "means." ¹

The expression "shall include" is not equal to "shall mean" ². It extends and does not restrict the definitions.³

The term 'includes' is used to extend or enlarge the meaning of the word, so that the term defined as "includes" indicates that, though it embraces or includes, what the defining Sections says, it means something else, according to its natural meaning. In some cases, "includes", may be equivalent to "mean and include" and in such a case it may afford an exhaustive explanation of the meaning which for the purposes of the particular Act must be invariably attached to those words or expressions.⁴

1. Bengal Coal Co. v. Janardhan Kishorelal Deo 1936 I. T. R. 392.

2. R. V. Keshaw 26 L. J. M. C. 19.

3. R. V. Hema 27 W. R. 475; 40, L. T. 263.

4. Datworth v. Commissioner of Stamp 1899 A. C. 106 (106) 68 L. J. P. C. 4, R. v. Garud others 16 B. 283 R. v. Asantosh Chakarvarty 4, C. 485 Vyankaji v. Sarjee Rao Appaji Rao 16 B. 536.

The term "means" above is used to indicate that the definition is "exhaustive".⁵

S. 2 (1) 'Accounting period':—The term "accounting period" is quite as important in connection with assessment to Excess Profits Tax as the term "previous year" is with reference to the assessment to income-tax.

According to the definition of the term, as contained in this sub-section, the term "accounting period" primarily is the successive period of twelve months when the accounts of the assessee's business are, in due course, made up for such period.

In any other case, the Assessing Officer is, under clause (b) Section 2 (1) given the option and the power to determine. And, in so determining the accounting period, a duty has been cast upon the Assessing Officer (the Excess Profits Tax Officer) to have regard to the previous year, if any, of the assessee determined for income-tax purposes.

This is the proviso to Section 2 (1) (b). There is no case law involving the question of accounting period under the Excess Profits Duty Act, 1919.

Under the English Law, cases have arisen relating to accounting period. In *James Cycle Company Ltd. Commissioner Inland Revenue*,¹ the accounts of the assessee company were made up and audited as at 31st August in each year, stock being taken only on that date. The books were totalled every month and balanced every quarter, and apart from the actual taking of stocks, such books contained a complete record of the whole of the company's trade for each quarter. For Excess Profits Duty assessment purposes, the year ending August 31, 1914, was treated as the first accounting period and the company's request to base the computation on early accounts, constructed from an aggregate of quarterly accounts in which the stock values were estimated,

5. *Royal Turf Club v. Secretary of State* 49 C. 844 1 I T. C. 108
C. I. T. *Bombay v. National Mutual Association of Australasia* 1933
Bom. 427.

1. 12 T. C. 98 (101, 103, 105, 106.)

was turned down, as it was observed that the profits shown in each quarterly account were not the twice profits for the quarter but merely the profits of the year distributed over the quarter.

Similar were the facts in *John Marston Ltd v. Commissioner Inland Revenue*.² In this case also accounts of the assessee company were made up and audited on 31st August every year and stock taken on that date. The year ending 31st August 1914 was taken to be the first accounting period. The company had amended annual accounts prepared by an adjustment in respect of accounts prepared for August each year and requested that computation of profits for Excess Profits Duty purposes be based on these. This was not allowed.

The question of accrual of profits during the accounting period arose in the case, *J. P. Hall & Co. Ltd. v. The Commissioner Inland Revenue*.³ In this case, it was held that profits for the purpose of the Excess Profits Duty arose in the accounting period in which the goods contracted for to be purchased and sold was actually delivered, and not in the pre-war period, during which contracts were made.

In *Isaac Holden & Sons Ltd. v. The Commissioner Inland Revenue*,⁴ the assessee company was a member of the Wool Combing Employers' Federation engaged in combing wool, on commission, for the Government. The amount of commission received by the assessee company at a subsequent period, in connection with the work done in the accounting period was held to be profits liable to be computed in the accounting period for Excess Profits Duty purposes.

(2) Appellate Assistant Commissioner :—Excess Profits Tax authorities are enumerated in Section 3 below. Sub-section "(C)" of this Section relates to Assistant Commissioners of Excess Profits Tax, who may be Appellate Assistant Commissioner of Excess Profits Tax. According to this

2. 12 T.C. 106 (110, 111, 112). 1921

3. 12 T.C. 382 (385, 390) = (1921) 1 K.B. 218 = (1921) 13 K.B. 152 = 90 L.J.K.B. 1229 = 125 L.T. 720

4. 13 T.C. 768 (771, 773) = 87 T.L.R. 744

sub-section, an Appellate Assistant Commissioner of Excess Profits Tax is to be the same person who is exercising the function of Appellate Assistant Commissioner of Income tax under the Income-tax Act, 1922 (as amended by the 1939 Amending Act). Sections 5 (1) (c) and 5 (4) of the Income tax 1922 (amended 1939) deal with Appellate Assistant Commissioners.

By the 1939 Amending Act, Assistant Commissioners have been divided into Appellate and Inspecting Assistant Commissioners. The former are under the direct control of the Central Board of Revenue (Section 5 (4) Income Tax Act). This change, or rather reform, is the outcome of the Income-tax Enquiry Committee Report and recognises the principle of the separation of the judicial from the Executive.

The Enquiry Committee observed in their report:— We have recommended that Assistant Commissioners hearing appeals should be relieved of their administrative functions. In order to secure the proper performance of these functions, and to remedy the defects referred to above, we recommended that full time "Inspecting Officers" of the Assistant Commissioner grade be appointed with no appellate jurisdiction. They would be responsible to the Commissioner for seeing that the works in the Circles under their control is efficiently performed, and it would be their duty, in addition to making thorough inspection of the Circles under their control, to give the income-tax officers advice and instructions.

It should be understood, also, that an Income-tax Officer should refer to his Inspecting Officer any major point of doubt or difficulty before he makes the assessment in question. In view of the recommendation that the Assistant Commissioners hearing appeals should have no administrative control over the Income-tax Officers, and that the assessee should have a second right of appeal to an independent Tribunal outside the Department, there can, we think, be no objection to this proposal which would, moreover, very often result in more accurate assessments and, therefore, fewer appeals.

3. Average Amount of Capital :—The average amount of capital employed in any business is to be computed with reference to and in accordance with the Rules laid down in the Second Schedule to the Act.

The question of computing the average amount of capital employed in an assessee's business is of primary importance, in connection with his assessment to Excess Profits Duty. This average amount forms a deduction and is an important item in the calculation of "standard profits," defined in Section 2 (21) *post*, and dealt with in detail in Section 6 below (See notes under both these, *post*, and also notes under Rules to Schedule 11. R. I, Sch. III relates to the determination and calculation of the average amount of capital, for the purposes of this Act.

Profits and losses of the period for which calculation of the average amount of capital employed in the business is made are to be taken into account (R.4 Schedule II below).

See also Notes under Schedule II Rules, post.

4. Board of Referees :—Section 3 of the Act provides that amongst the Excess Profits Tax Authorities there shall be a Board of Referees. It shall be constituted in accordance with the provisions of Section 3 (6) *post*, regulating on its formation, composition and procedure. It shall consist of not less than three and of not more than five persons, not less than half of these being non-officials with business experience, and one shall be a judicial officer not inferior in rank to a Subordinate Judge or a Judge of Small Causes Court who has held judicial office for a period of not less than ten years (Section 3 (5)). For functions of the Board of Referees see under Section 6 *post*.

It was pointed out in some quarters, when the Act was in its Bill stage, that the consolatory provision providing for examination of certain cases by a Board of Referees of an equal number of officials and non-official was practically of no avail.

The Board was, it was stated, tied down by the letter of

the law, with the statutory percentage being already there, the method of computing capital laid down by a Schedule in the Act, and there being no provision giving relief for unabsorbed depreciation or against arrears of losses, except as enunciated by the Act, the Board of Referees position will be merely those of "Interpreters". For further see notes under Section 3 (5), 3 (6) and Section 6 (3) *post*.

5. "Business":—The definition of the term 'business', as given in the Excess Profits Tax Act, 1940, is far wider than the one that existed in the Excess Profits Duty Act, 10 of 1919. The latter was bodily taken from the definition of "business" as given in the Income Tax Act of 1918. In the definition as given now, in the 1940 Act, the provisos have been taken bodily from English Finance Act 2 of 1939 relating to Excess Profits Tax. In the Bill as presented there were three provisos; the first proviso now forms part of the definition, being the last portion of it. The after two proviso, are the same as they stood in the Bill. As such, the English case-law on the subject as cited hereunder may well be applicable to cases now arising. The term 'include' has, for the first time, been used in the defining Section, with relation to business. The object is quite evident, which is to cast the net of Excess Profits Tax as wide as possibly can be.

The question, whether the definition of the term "business" given in Excess Profits Duty Act, (1919) was exhaustive or not, arose in a Calcutta case, under the Excess Profits Duty Act, 10 of 1919 ¹. It was observed in the case: In order to see what is meant by the word "business" reference must be made to Section 2 of the Act. There we find that "business" include any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture. The question which we have to decide is whether, on the facts of this case and by reason of the sums received by the Club

(1) The Royal Calcutta Turf Club v. Secretary of State for India in Council 1 I. T. C. 108 (111)=48C. 844=25 C. W. N. 734=66 I. C. 473.

from persons who are not members of the Club, in respect of the first four heads set out in the reference, the Club can be said to be carrying on 'business', within the meaning of Section 2. On the one hand, the learned Counsel Mr. S. R. Dass and Mr. Pugh who appeared for the Royal Calcutta Turf Club argued that the definition of "business" in Section 2, was an exhaustive definition and that the word 'includes' must be read as being equivalent to "means and includes". On the other hand Mr. Sarkar on behalf of the Crown argued that "include" means "includes". Our attention was drawn to the fact that in other definitions which are to be found in Section 2 the word "means" is used, for instance, "accounting period" means the twelve months ending on, etc, "Chief Revenue Authority" means the Board of Revenue, "prescribed" means prescribed by rules. The learned Counsel for the Crown further argued that if the definition of 'business' in Section 2 was intended to be exhaustive then there would be no reason for the insertion in Schedule 1 of the Act of the second and third instances which are given in the list of "excepted business" in that Scheduleconsequently it is not necessary for us to decide whether the definition of the word "business" in Section 2 is exhaustive or not".

In another case under the Excess Profits Duty Act,² It was held that 'business' in Section 2 Excess Profits Duty Act must be given the same meaning as is given in the income-tax Act. It was observed :—"Mr. Giles on behalf of the Companies concerned urges strongly that the contents of the term "business" are the same in the income-tax Act and the Excess Profits Duty Act,".....There seem to be serious difficulties in giving the term 'business' a wider meaning under the Excess Profits Duty Act than under the income-tax Act. The income tax Act was passed in 1918* and it was clearly the basis on which the Legislature worked in framing the Excess Profits Duty Act 1919. Many of the Sections of the

2, Kaladan Suratee Bazar Co. Ltd. *In re.* 1 I.T.C. 50 (51-52,51).

*This case went up to the Rangoon Chief Court in 1920, when the 1918 Income Tax Act was in force. The definition of 'business' in the 1922 Act (amended 1939) is the same as in the 1918 Act. [*Vide* Section 2 (4) Act, 1922

former are incorporated in the latter with only slight modifications and the definition of "business" in the Income Tax Act is reproduced *verbatim* in the Excess Profits Duty Act. Therefore, . . . it is difficult to hold that the Act contemplates and any extension of the word "business" beyond the meaningp assigne to it in the Income tax Act we find that they* impose the excess profits duty only on "excess profits arising out of certain businesses" (*vide* preamble of the Act) not on certain sources of 'income', as we might, I think, expect if it was really intended to throw the net wider and bring under assessment to excess profits duty sources of income other than those classed as 'business' in the Income tax Act. In this very case, it was observed :—"It is instructive to compare the English legislation on the subject with the Indian enactments. In the Income tax Act of 1842 (5 & 6 Vic. Ch. 35) income is classified according as it is derived from property in land (Schedule A), occupation of land (Schedule B), dividends (Schedule C), professional and trade profits (Schedule D). The 'first case' in Schedule D deals with duties on trade profits. It is headed 'Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other Schedule of this Act.' The first case in Schedule D is evidently the source from which the definition of business in the two Indian enactments comes.

Referring to the English case, *Commissioner Inland Revenue v. Sangster*³ the learned Judges quoted Mr. Justice Rowlatt's remarks therein: "It looks as if in the use of the vague word, 'business' the legislature was not glancing at anything more than that it is taxable under case 1, Schedule D of the Income-tax Act, 1842."

The learned Rangoon Judges then observed :—" The same remarks may be applied to 'business' in the Indian Act. We may conjecture that when they were imposing this duty the Indian legislature was not merely glancing at what was taxable under the head of business in the Income tax Act of

* (i. e. the legislature)

3. (1920) 2 K. B. 587 = 12 T.C. 208 (216).

the previous year but had their eyes firmly fixed on it. Otherwise it is hard to conceive why they should have repeated the same definition of business as in the Income-tax Act. Further on, it was remarked that although the definition of 'business' in the two Indian Act* is not exhaustive, its looseness will not justify the introduction of things which, according to the scheme of Income-tax Act, are wholly dissimilar."

In this case, companies owning houses, consisting of tenants and stalls, letting them out on rent and dividing, the rents as dividend were held not to carry on business as defined in Section 2 Excess Profits Duty Act.

The Financial Commissioner, as the Chief Revenue Authority, had taken the view that, though assessed to income tax, under Section 9 as house property, the tenants and stalls let out on rent were 'business' as they were not exempted in the Schedule like profession.

On reference, however, the Chief Court of Lower Burma negatived the above view, both looking to the definition of the term 'business' and on general consideration also. It was held that the bazar companies owning house property and letting it out on rent were not carrying on business and were held as not liable to Excess Profits Duty. A Turf club, however, was held to carry on business, for the purposes of Excess Profits Duty, under Section 2, Excess Profits Duty Act, in respect of entrance fee to the stands, paddocks or gate money, entrance fee paid by owners of houses, book makers, license fee and percentage of totalization⁴. As will be seen, the definition of the term 'business' in Section 2 (5) consists distinctly of two parts, one affirmative, *i. e.* what the term includes, and the other negative, what it does not include.

The words used in the Excess Profits Tax Act, 1940 (affirmative portion) are the same as used in the Indian Income tax Act, 1922 [Section 2 (4)]. The same words are used in the English Excess Profits Duty Act.

* The Indian Income-tax Act 1922 (amended 1989) and Excess Profits Duty Act, 1919. As the definition in the Excess Profits Duty Act, 1940 is also the same the remarks apply equally now also.

4. *The Royal Turf Club v. The Secretary of State of India* 1 I. T. C. 108=(1921) 1 L.R. 49 Cal. 844=25 C. W. N. 784=66 Ind. Cas. 478.

'Trades':—'Trade' 'commerce' and 'manufacture' may well be said to be the 'ruling words' of this sub-section. As already pointed out above 'trade' has been used in English law for 'business' and though ordinarily speaking, 'business' is synonymous with 'trade'¹ yet 'business' has admittedly more extensive meaning than 'trade'.² 'Trade' in its largest sense is the business of selling with a view to profit goods which the trader has either manufactured or himself purchased.³ Buying in itself does not constitute a 'trade'; unless the selling also is taken into account there are no profits.^{3-a} Trade is a compound fact made up of variety of incidents.⁴ A series of retail purchases followed by one bulk sale or a single bulk purchases followed by a series of retail sales may well constitute a 'trade'.⁵ Where a person habitually does and contracts to do a thing capable of producing profit, and for the purpose of producing profit, he carries trade.⁶ Be it noted, at the same time, that, though it is perfectly true that trade does, as a matter of fact—it may be in 99 out of hundred cases—include the idea of profit, yet the mere word 'trade' does not necessarily mean profit to be made by the seller to the buyer or by the buyer from the seller.⁷ As no man can trade with himself so members of mutual societies whose interests in the transaction for which the society exists are identical, cannot be said to trade amongst themselves.⁸ A trustee for creditors who, while winding up the firm's business, carries on a portion of it for profit, was, to that extent, held to have been carrying on 'trade'.⁹ "Trade" excludes the idea

(1) *Delamy v. Delamy*, 15 L.R.T.V. 67.

(2) *Harris v. Amery*, 35 L. J. Ch. 92; L. R. I. C. P. 148, *Rolls v. Miller* 53 L. J. Ch. 101.

(3) (Per Lord Daney) in *Grainger v. Gugh*. (1896) AC. 345; 3 T.C. 462.

(3-a) (Per Lord Watson) in *ibid.*

(4) (Per Jessel M. R.) in *Erichsen v. Last*, 4 T. C. 420.

(5) (Per Sargent L. J.) in *Martin v. Lowany*, 11 T. C. 297; A. T. C. 11

(6) (Per Esher M. R.) in *Werte v. Colquhoun*, 2 T. C. 402.

(7) *Commissioner of Inland Revenue v. The Incorporated Council of Law Reporting*, 3 T.C. 105.

(8) *Dublin Corporation v. M. C. Adam*, 2 T. C. 387.

(9) *Armitage v. Moore* 4 T.C. 199; (1900) 2. Q.B. 363. *Coman v. The Governors of the Rotunda Hospital, Dublin*, 7 T. C. 517; •

of single or isolated business, [See *Commissioner I. T. Bengal v. Shaw Wallace*, 6 I.T.C 178 (P.C.).

"Commerce":—The terms 'trade' and 'Commerce' are taken in ordinary parlance to be synonyms. *Stroud* defines 'commerce' as : "traffic, trade or merchandise in buying and selling of goods." According to *Webster* 'Commerce' is the 'exchange' or buying and selling of commodities, specially on a large scale. The distinction between 'trade' and 'commerce' is after all, very subtle being one of degree only, commerce indicating a larger scale of activities of buying and selling between different countries and communities. The distinction, however, is however, is immaterial, as 'business', as defined in Section 2 (4),* embraces both

"Manufacture:"—It has been rightly observed that no more philosophical or abstract principle can answer to the word 'manufacture', for the term implies necessarily the idea of making by man of something tangible and substantial from the matters subject to his art and skill, or at the least, some mode of employing practically his art and skill. This is what is required to satisfy the word 'manufacture'.¹ "To work up into form suitable for use" is 'manufacture according to *Murray's New English Dictionary*, while *Annandale's Concise English Dictionary*, also gives almost a similar explanation of the term as: "the operation of reducing raw material for use by more or less complicated process. To make from raw materials by any means into a form suitable for use" is 'manufacture.'² Be it noted carefully that although the terms 'trade, commerce' and 'manufacture' are wide enough, yet the underlying idea in each of them is the 'continuity' or the continuous exercise of an activity relating to it. The words 'carried on by him' in Section 10 (1) also lend support to the same view.³

* Income-tax Act 1922.

(1) *V. F. Gibson v. Bran* 4 M & G 199=11 L J C. P 177

(2) *Twentieth Century Chamber's Dictionary*

(3) *Commissioner I T Bengal v Shaw Wallace*, 59 I A 206 (P C); 6 I. T. C. 178. • :

“Adventure”:—The term ‘adventure’ (according to *Webster*, is mercantile or speculative enterprise or hazard; it is a bold and dangerous undertaking of uncertain issue, a speculation of any kind commercial or financial.* The term connotes the idea of risk, be it even remote.

8. “Concern”:—The term ‘concern’ means an affair, an establishment, a firm for a transaction of business, a manufacturing or commercial establishment. There is some idea of continuity involved in ‘concern’ as opposed to risk in an ‘adventure’.

In the nature of the trade, commerce or manufacture these words qualify only ‘concern’ and not ‘adventure.’ (a) The term ‘business’ is wider than ‘trade.’

Business (a)—Import of:—It has already been stated above that business is wider than ‘trade’. But what is the true import of ‘business’? Any thing which occupies the time, attention and labour of man for the purpose of profit is ‘business’¹. The word ‘business’ is one of large and indefinite import.² ‘Business’ includes also any adventure, e.g., the negotiation of the sale of a large mill resulting in a large commission being levied.³ The idea of profit being predominant in business it is immaterial as to how the profits are applied, the motive of making profits also being immaterial.⁴ In each case whether it is a case of business or not is a question of fact.⁵ The

* Imperial dictionary

(1) *Smith v. Anderson*, 15, Ch. D. 257, 50 L. J. Ch. 43. *Rolls v. Miller*, (1884) 27 Ch. D. 71 (88), *Commissioner Inland Revenue v. Marine Steam Turbine Co.*, (1920) I.K.B. 190; 12 T. C. 174. *Rogers Pyatt Shellac & Co. v. Secretary of State*, 1 I.T.C., 363 (374).

(2) *Ibid.*

(3) *Chuni Lal Kalyan Dass, in re*: 47 A. 368, 1 I. T. C. 419.

(4) *Trustees of Psalms and Hymns v. White Well*, 3 T. C. 7; *Religious Tract & Book Society v. Forbes*, 3 T. C., 415; *Grove v. Y. M. C. A.*, 4 T. C. 613, *Mersey Docks v. Lucas*, 1 T. C. 385; *Commissioner v. Governors of Rotunda Hospital*, 7 T. C. 517; *Commissioner Inland Revenue v. The Incorporated Council of Law Reporting*, 3 T. C. 105.

(5) *Mellar v. Commissioner of Inland Rev.* 3 A. T. C. 659; *Athlone Land Co., v. Secretary of State*, 1 I. T. C. 167; *Edwards v. Old Bush Mills Distillery Co.*, 10 T. C. 285.

question also, whether the business is one or many is one of fact.⁶ for a person may have more than one business.⁷ A casual dealing or an isolated transaction, even though resulting in profits, is not business, intention gathered from facts and circumstances of the case being looked.⁸

Business.—(b) What is :—

- (1) A skilled Engineer acting both as a consulting engineer and as an inventor.¹
- (2) Executors may be carrying on "trade" to the extent of winding up business left to them by testator;²
- (3) Partners, on dissolution, receiving and delivering goods already contracted for;³
- (4) Receipt of royalty by a company;⁴
- (5) Income from colliery to a company which was formed to administer the estate of beneficiaries all of whom transferred the estate for shares to the company;⁵
- (6) Investment of Insurance money and sale-proceeds of a ship by a shipping company;⁶
- (7) Company formed to receive assets and liabilities of a theatrical company receiving rent of rebuilt premises of the theatre;⁷
- (8) Trustee for creditors' firm, liquidating the firm, carrying on a part of business;⁸
- (9) Financing litigation;⁹

(6) Gloucester Ry. Carriage Co. v. Commissioner Inland Revenue, 12 T. C. 720.

(7) Commissioner Inland Revenue v. Maxee, (1919) 1 K. B. 647; C. I. R. v. Ramson, (1918) 2 K. B. 749; Egyptian Hotels Ltd., v. Mitchell, 1915 A. C. 1022=6 T.C. 542.

(8) Ganga Sagar (R. B. Seth) v. Commissioner I. T. U. P. & C. P. I I. T. C. 81=11984 All 370.

(1) Commissioner of Inland Revenue v. Mar. 4 A. T. C. 467.

(2) The Executors of E. A. Cohan v. Commissioner Inland Revenue, 12 T. C. 602.

(3) Hillerus & Fowler v. Murray, 17 T. C. 77.

(4) Korean Syndicate. *Inf res* 12 T. C. 181. South Bihar Ry. Co., v. Commissioner Inland Revenue, 12 T. C. 657; (Followed in Pondicherry Ry. Co., 5 I. T. C. 362).

(5) Commissioner of Inland Revenue v. Westerley Estates, 3 A. T. C. 17.

(6) Commissioner Inland Revenue v. Dale Steamship Co. 12 T. C. 712.

(7) Commissioner Inland Revenue v. Birmingham Theatre Royal State Co., Ltd. 12 T. C. 580.

(8) Armitage v. Moore, 4 A. T. C. 199.

(9) Gya Pd. Chhotey Lal v. Commissioner I. T. C. P. & U. P., 9 I. T. C. 64 1935, I. T. R. 177=1985 All. 495.

- (10) Purchase and sale of Government Securities and Treasury Bills by a money-lender;¹⁰
- (11) Letting out of jute press on rent;¹¹
- (12) Agreement by an Indian company to pay to an English company half of net profits and a lump sum, in lieu of not exercising a certain right;¹²
- (13) Money-lender-creditor taking over the properties of one of his failed debtors and making profit out of one of these, (Rubber plantation);¹³
- (14) Money-lender, interested in various kinds of business, purchasing a large quantity of cheap paper, and selling it at a profit in one consignment;¹⁴
- (15) Extraction and sale of coal;¹⁵
- (16) Horse-race club making income from licenses and entrance fees;¹⁶
- (17) Colliery agents purchasing wagon on their own account as a speculation and selling the same on profits, (though isolated transaction).¹⁷

Business.—(c) What is not:—(1) Company holding house property and distributing rent and profits to share-holders;¹

(10) *Rm. A. R. A. R. Arunachalam Chettiar v. Commissioner I. T. Mad.* 8 I. T. C. 219.

(11) *Sadhu Charn Roy Chaudhri v. Commissioner I. T. Bengal*, 8 I. T. C. 177:64 C. 804: 1935 Cal. 344: 1935 I. T. R. 114.

(12) *The Indian Radio Cable Communications Ltd. v. Commissioner, I. T. Bengal*, 8 I. T. C. 233, 1936 I. T. R. 90.

(13) *Lakshman Chettiar v. Commissioner I.T. Mad.* 1930 Mad. 131 41. T. C. 200

(14) *Rutledge v. Commissioner Inland Rev.*, 14 T. C. 490.

(15) *Isabella Coal Co. v. Commissioner, I. T. Bengal*, 53 C. 76: 1926 Cal. 396 : 2 I.T.C. 87.

(16) *Royal Calcutta Turf Club v. Secretary of State*, 48 C 844: I I. T. C. 108.

(17) *Barton & Co. Ltd. v. Ogg*, 7 T. C. 125.

(1) *Kaladan Suratee Bazar Co., Ltd. In re. I.I.T.C.* 50: 56 I.C. 914.

(2) Income from sale of patent by a managing director of a company, also a director of several other companies, and an inventor, having sold a patent years ago. (The position of book-maker or an author is the same as that of an inventor as mentioned in *Commissioner Inland Revenue v. Sangster* herein cited and apparently the finding to the contrary in *Chunni Lal Kalian Dass*³ is not justified) See also *re*: this Para 45 I.T. Manual and the following observation:—"The question before the learned Judge who decided the case reported in 23 A.L.J. 63, was whether profits arising out of wagering contracts which are illegal was taxable or not. It was rightly held that illegal incomes are taxable. There can be no objection to the judgment so far. But there seems to be no justification for the comparison of illegal incomes with income of a book-maker, and the observation that "as to whose business there can be no doubt whatever that is entirely gaming and wagering." The income of the bookmaker, is, it is submitted, any thing but gaming and wagering, and there is absolutely nothing illegal about it." (Be it noted here carefully that 'business' for income-tax purposes does not include 'profession' although under the Indian Partnership Act it does.)

(3) A barrister using part of the land of his residence for cattle-breeding and growing vegetables, fruits and flowers which he occasionally sold ;³

(4) Money-lender purchasing legacies through Court and realizing profit out of it after incurring costs ;⁴

(5) Purchase and sale of shares and securities by a money-lender ;⁵

(6) Principal residing in British India not controlling his foreign business but merely acquainting himself

(2) *Commissioner Inland Revenue v. Sangster*, 12 T.C. 208.

(3) 23 All. 68; 1925 All. 287; 1 I.T.C. 418; (also *Partridge v. Mallandaine* 18 Q. D. 276.=2 T.C. 179.

(3) *Re: Wallis Eparate Sully*, 14 Q. B. D. 950.

(4) *Mothey Gungaram v. Commissioner I. T.*, C. Mad. 8 I. T. C. 76; 1935 Mad. 887; 58 M. 363; 1935, I. T. R. 58.

(5) *Ganga Sagar (R. B. Seth) v. Commissioner I.T.* U. P. C. P., 7 I. T.C. 81; 1984 All. 570; 1984 I. T. R. 110.

with the state of that business and occasionally issuing general instructions ; ⁶

- (7) Company incorporated for owning and letting out property making income out of the same ; ⁷ though income assessable under Section (9)
- (8) Owner of stud farm using the land for stud purposes and receiving fee for his stallions serving mares on his farm. ⁸

Besides the English cases cited above, there are also other judicial decisions under the English law where the distinction between income from 'trade' or 'business' and other incomes has been pointed out. In *Commissioner Inland Revenue v Sangster* (12 T. C. 208) royalties received by an inventor, negotiating with companies for use of his inventions were held to be income from property and not from trading. On the other hand, in *Commissioner Inland Revenue v. Korean Syndicate* (12 T.C. 181) a company that simply received bank interest and royalties was held to be carrying on business, as it acquired concessions and turned them to account. The decision in *Commissioner Inland Revenue v. The Budderpore Oil Co. Ltd* (12 T.C. 467) was also similar.

As against the above decision, it was held in *Commissioner Inland Revenue v. The Marine Steam Turbine Co., Ltd.* (12 T.C. 174) that mere receipt of royalties on patents sold was not carrying on business.

Cases of Railway Companies receiving an annuity as consideration for constructing a railway and interest on investments are also those where it has been held that they were carrying on business. It has been so held in the case of *Commissioner Inland Revenue v. South Bihar Rly. Co. Ltd.* (12 T. C. 687). in *Commissioner Inland Revenue v. Edinburgh & Bathgate Rly. Co.* (12 T.C. 895) and in

(6) *Commissioner v. S. R. M. A. R. Ramanathan Chetty* 48 M. 75: 1 I. T. C. 97

(7) *Commercial Properties Ltd. In re.* 1928 Cal. 456; 8 I.T.C. C. 23.

(8) *Lord Glanby v. Whitman*, 17 T.C. 684; 49 T.L.R. 356; 1938 P.C. 618

Commissioner Inland Revenue v. Bringham Theatre Royal Estate Co. Ltd. (12 T.C. 580). The principle was applied to shipping company also in *Commissioner Inland Revenue v. Dale Steamship Co. Ltd.* (12 T.C. 712).

Another point in connection with the carrying on of business by companies is where they go in liquidation. In *Spiers & Sons Ltd. v. Ogden* (17 T.C. 117) it was held that whether an operation constituted the carrying on of a business or simply the realization of capital asset was a question which depended on the facts of each case.

Where a firm realized its trading stock, on retiring from business by a number of transactions, these were held to constitute trading. (*J. & R. Okane v. Commissioner Inland Revenue* (12 T.C. 602). In *Cohans, Executors v. Commissioner Inland Revenue*, (12 T.C. 602) it was held that the executors of the deceased merely realized assets and did not carry on trade. In a later case, however, *Hillerns & Fowler v. Merry*, (17 T.C. 77) it was held that the completion of contracts after dissolution of a firm constituted trading.

All these cases and those decided under the English law, subsequently, as recently as 1936-1937, point out to the one great principle in such cases that the only question was the method by which the assets were liquidated. Did that form of liquidation involve the carrying on of a trade by the liquidator or by the company?

(Per Lawrence L. J., in *Wilson Box Ltd. v. Bryce*, (20 T.C. 736).

The last, which is the negative portion of the definition of the term 'business' excludes profession, whether carried on by one man (individual), or by 'individuals' in partnership, when the earning of profits depend upon his or their personal qualifications. The very same words are used in Section 39 (c) Finance Act, 1915. Now, what is a 'profession'? It has been said that it is impossible to lay down any strict legal definition of what is a profession, because people carry on such infinite varieties of trades and businesses that it is a question

of degree in nearly every case whether the form of business that particular man carries is, or is not a profession.⁵

In the same case, the same Lord Justice observed further: "But I do desire to say this, as the Master of the Rolls has mentioned it, that I myself am disposed to attach some importance in findings as to whether a profession is exercised or not to the fact that the particular man is a member of an organised profession with a recognised standard of ability enforced before he can enter it and a recognised standard of conduct enforced while he is practising in it. I do not say it settles the matter for a moment, but if I were deciding a question of profession I should attach some importance to that particular feature."⁶

In another English case⁷ the same Lord Justice (*Scrutton L. J.*) observed:—"I am very reluctant finally to propound a comprehensive definition. A set of facts not present to the mind of the judicial propounder, and not raised in the case before him, may immediately arise to confound his proposition. But it seems to me, as at present advised, that a 'profession' in the present use of language, involves the idea of an occupation requiring either purely intellectual skill, or if any manual skill, as in painting and sculpture, or surgery, skill controlled by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production, or sale, or arrangement for the production or sale of commodities. The line of demarcation may vary from time to time. The word 'profession' used to be confined to the three learned professions, the Church, Medicine and Law.

It has now, I think, a wider meaning. It appears to me clear that a journalist whose contributions have any literary form, as distinguished from a reporter, exercises a 'profession' and that the editor of a periodical comes in the same category.^{7-a} A publisher of a journal, however, was held, in this case, not to carry on profession while profits from

5. Per *Scrutton L. J.* in *Currie v. Commissioner Inland Revenue* 12 T. C. 245 (246)

6. *Ibid* p. 265

7. *Commissioner Inland Revenue v. Maxse*, p. 12 T. C. 41 (61-62) (7-a.) *Ibid* 12 T. C. 61-62

authorship have been held to be so. "If a man carries on the occupation of advising people upon purely commercial matters—that is not confined, I think, merely to buying and selling—he is not a professional man; on the other hand, if he confines himself to advising on matters which depend upon intellect he clearly is a professional man. If you find a man, who does nothing but advise, as to how buildings can be built so as to support necessary stresses and afford the necessary accommodation and at the same time present a handsome appearance or possibly a pleasing appearance, then he is a pure architect and he is a professional man ⁸."

The business of an auctioneer, valuer and estate agent has, in part, at least, been held to be a profession ⁹.

A profession may be carried on by a company as well as by an individual.¹⁰

The word 'employment' used with 'profession' has been held to mean the way a man busies himself ¹¹. Though the question whether it is a profession or employment does not turn on the degree of skill, nor it is a question of duration, ^{11-a} yet you can have both an employment and a profession at the same time in different categories. ^{11-b}

While the definition of 'business' in Section 2 (5) excludes 'profession' generally, from the category of business for Excess Profits Tax purposes, the Section excludes a particular profession, that of making contract, from the said category. Under the English law, certain contracts have been held to be the carrying on of business.

Proviso I:—The provisions of this proviso have also been taken bodily from the English (Finance Act, 2) Act, 1939, Section 12 (4). While the Section excluded a particular

8. 12 T. C. 254 (255).

9. Commissioner Inland Revenue v. Peter McIntyre Ltd. 12 T. C. 1006, (10013, 10014).

10. *Ibid.*

11. *Daires v. Braithwaite* 18 T. C. 198 (203).

11-a *Ibid.*

11-b *Ibid* (203, 204).

line of business, *i.e.*, the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts, the second proviso includes as business the function of a company consisting wholly or mainly in the holding of investments or property.

The provisions of this Proviso have been taken from the English Law. Under the English law, a 'holding' company whose principal business consisted of making investments was held to carry on trade or business. This was the case of the *Commissioner Inland Revenue v. The Tyre Investments Trusts Ltd.*¹ The principal business of the company consisted in making investments. The company held shares in other companies which it bought itself in the most active way. It occupied itself as an alert and astute shareholder, looking after its holdings in those companies and the companies themselves; that was its activity, which it pursued zealously. The company was held to carry on business.

Holdings in War Loans and other British Government Securities have been held to be investments². The connotation and import of the term 'investment' has been the subject of judicial decisions under the law relating to Excess Profits Duty. In the case of the *Gas lighting Improvement Co., Ltd. v. Inland Revenue Commissioner*.³ Lord Sumner says that the word, 'investment' is a word which must be taken in its ordinary and business sense. It is "not to be enlarged figuratively, nor controlled by some notion about the scheme or policy, if there was one, of the Emergency tax (*i.e.* Excess Profits Duty.....I think that in such a statute, the plain meaning is the true one, and I am unable to see any ground here for adopting any construction which is less than plain". The same Lord, in an earlier portion of the judgment, observes that the truth is that these investments are made, as I suppose, all good traders' investments are made, with a sound business motive.....and the prospects of dividends may have had little

1. 12 T. C. 646.

2. *Liberty & Co., Ltd. v. The Commissioner Inland Revenue* 12 T. C. 630.

3. 12 T. C. 503 (543).

to do with the matter, but a non-substantive (i.e. the word 'investment') in a statute does not take its colour, like a chameleon, from such surroundings as the motives of the persons whose property it correctly describes."

In the same case, *Lord Sterndale M. R.* observed:—
 "Investment is to be taken in its ordinary sense as being an investment, whether it be or be not connected with the business that is carried on by the investor.^{3-a} The same interpretation was put by *Pollock M. R.* in *Liberty & Co., Ltd. v. The Commissioner Inland Revenue* (12 T. C. 630, 642), cited above.

In *Bourne and Hollindsworth v. The Commissioner Inland Revenue*⁴ also, holdings of war loan were held to be investments, for the purposes of Excess Profits Duty. In this case, *Sankey J.* observed: "Here there was material upon which the Commissioners could find on the second point that this was in this particular case an investment. I do not like to hazard the opinion that in all cases money placed in war loan would be an investment. I think you have to consider the facts of the case. It may be different in the case of an investment company, and indeed the Act provides for that because it goes on to say, except in the case of life insurance business where the principal business consists in the making of investments."

In the *Lincoln Wagon and Engine Co., Ltd. v. The Commissioner Inland Revenue*⁵, Treasury Bills and War Loans held by a company were held to be investments. Investments by a company on Treasury Bills renewed from time to time on maturity were held to be investments in the *Commissioner Inland Revenue v. Dalc Steamship Co., Ltd.*⁶ The principle of the above case-law should be held applicable to the law as contained in Proviso to Section 2 (5) of the Excess Profits Tax Act, in India.

Proviso 2—This is also the same as the English law contained in Section 12 (5), Finance Act, 2 of 1939.

3—a Per *Lord Sterndale M. R.* in 12 T. C. 503, 525.

4. 12 T. C. 483

5. 12 T. C. 494 (502)

6. 12 T. C. 712.

"One business":—In a case under the Excess Profits Duty Act (10 of 1919), assessee had two shops at two different places (N & C.) in Madras. He was assessed to Excess Profits Duty on a single sum as income from his two shops. He contended that his businesses at the two shops were different and were, therefore, not one but two distinct businesses. He alleged that his business at shop at N was retail and concerned with over 70 articles of merchandise, while that at shop C was wholesale and concerned with only 4 or 5 articles. On a reference to the High Court, it was pointed out in the statement of the case that while the words, 'in respect of any business' to which this Act applies, occurring in Section 4 Excess Profit Duty Act, appear to indicate a single business, the definition of the word 'business,' occurring in Section 2 does not appear to preclude the clubbing together of any number of adventures or concerns in the nature of trade, commerce or manufacturers so long as the proprietor is the same.

The High Court, however, held that the two shops constituted different businesses. It was observed:—"The assessment of Excess Profits is on the profits of the business and on the person owning the business or entitled to the profits and we think that these two shops must be treated as different business.

By the introduction of Proviso 3, the point of the above ruling may well be taken to be overruled.

(6) Chargeable accounting period:—The term 'chargeable accounting period' was not defined under the Excess Profits Duty Act, 1919.

The definition of the term as given now has been taken bodily from the English Act (Finance Act 2 of 1939). In the Bill as presented to the Assembly, the period was the one beginning on or after the 1st day of April, 1939. The Select Committee altered it to what it is now. They observed:—

"We have adopted the expedient of altering the definition of Chargeable accounting period, so that at the end of March, 1941, unless by an amending Act that date is extended, the taxing provisions cease to have effect and of making a change in clause 4 to secure that before that date and thereafter annually at the time the Finance Bill is before the legislature the legislature shall have an opportunity of reconsidering the rate at which the tax is charged. We have also received an assurance, which we desire to record in this Report, that Government will promote any further legislation which is in its opinion necessary or desirable to remedy short-comings which may reveal themselves in the working of the Bill when passed. We have further received an assurance that when the Act is repealed any right, privilege, obligation or liability acquired, accrued or incurred under the Act will not be affected, and that, therefore, assesseees will have secured to them the payment of any refunds to which they are entitled the committee was assured that steps will be taken to ensure that such refunds will be duly made" and we have altered the date on which excess profits become liable to taxation from the first day of April to the first day of September, 1939.

In the course of debate on the Bill, while accepting the principle that the State should have a reasonable share of war profits, it was pointed out that that share was exceeded in the provisions of the Bill which was characterised as a blind copy of the British Act". The inclusion of the year 1938-39 in the "chargeable accounting period" was cited as an instance in point. The Finance Member in his reply admitted having realised that the period between April 1, 1939 and the actual outbreak of the war was not in India a period of abnormal activity. But he agreed that the effect of it on the scheme of the Bill was to mitigate the excess which would be determined for taxation. If a business was making losses, effect of those months was to reduce the incidence of tax. The Finance Member, however, declined to accept the date as 1st April 1940 onwards as suggested in some quarters. Because that, he thought, should be definitely foregoing the application of the principle of the Bill to many months of war

profits which he could not afford to accept. This position was, however, relaxed after discussions in the Select Committee and the changes above-indicated were made.

7. Commissioners :—The functions of a Commissioner of Excess Profits Tax shall be performed by the same person who is the Commissioner of Income Tax under the Income Tax Act, 1922. See Section 3 (2) *post* and notes thereunder.

8 Company :—The definition of the term “company” in this Act is the same as in the Income Tax Act, 1922 (amended 1939). The definition is intended to include all companies constituted in the dominions of the Crown, while the latter part of the definition is confined to such foreign associations as the Central Board of Revenue may desire to treat as ‘companies’ under the Act.

The word ‘company’, as defined in the Indian Companies Act, 1913, widens the scope of the definition so as to include companies limited by guarantee also.

“Company” as defined in the Indian Companies Act, 1913 :—Section 2 (2) Indian Companies Act, 1913, defines the term ‘company’ as: “a company *formed and registered* under this Act of an existing company”. Section 5 of the said Act prescribes the mode for formation of companies—

It runs thus :—“Any seven or more persons or, where the company to be formed will be a private company, any two or more persons, associated for any lawful purpose may, by subscribing their name to a Memorandum of Association and otherwise complying with the requirements this Act in respect of registration, form an incorporated company, with or without limited liability, that is to say, either—

- (i) a company having the liability of its members limited by memorandum to the amount, if any, unpaid, on the shares respectively held by them, (in this Act termed a company limited by shares); or

(ii) a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up, (in this Act termed a company limited by guarantee) : or,

(iii) a company not having any limit on the liability of its members (in this Act termed an unlimited company).

According to Section 2 (13), a 'private' company, is one that, by its articles, restricts the right to transfer its share and limits the number of its share-holders to fifty (exclusive of its employees) and prohibits inviting public to purchase its shares or debentures.

"Registration" of company, registration is compulsory in the case of companies of more than 20 persons, unless formed in pursuance of an Act of Parliament or Letters Patent or an Act of Governor-General in Council, [Section 4 (2)], and in the case of companies doing banking business, in case of companies of more than ten persons, subject, of course, to the same qualification as to their formation as above [Section 4 (11)]. The rules about the formation and incorporation of companies differ in different parts of the British Empire. Once, however, a company is incorporated under the law, the motive of incorporation cannot be challenged and it is a company for the purposes of this Act. Under Section 24 Indian Companies Act, a certificate of incorporation by the Registrar of Joint Stock Companies is conclusive proof of the incorporation of the company, whereupon it becomes a body corporate, a separate entity, distinct from share-holders and having, by the fiction of law, a juristic existence of its own, with no physical existence. '*Existing companies*' would be companies registered under the Companies Act, previous to that of 1913, i.e., existing at the time of the enforcement of the 1913 Act. A point of interest, which is noteworthy in connection with companies having share-holders with a liability limited to the extent of shares, is the number of shares to be purchased by shareholders. While, as noted above, Section 5 limits

the number of share-holders to seven and two in case of public or private companies respectively, it does not restrict the number of shares by a maximum or minimum, to be purchased by each of share-holder. Hence, a company formed by a man holding a bulk of shares in his own name and a share each in the name of his wife and children, being, practically, a 'one man's company' is a company valid under the law. The ordinary reason for which a man forms his business into a company is that he may have the advantage of the trading of the company by holding a greater part of the shares and receiving a greater part of the profits in dividends as they are distributed; while at the same time he need not be personally liable on the contracts which are made to earn the profits. Such an object is perfectly legitimate and it was so held in *Salomon v. Salomon*.¹ Since the words occurring in Section 4 (1) and (2) Indian Companies Act are: 'company', 'association and partnership', it may be well, briefly to note the distinction between a 'company'; and 'partnership': --

(1) A 'company' is a separate person, apart from the share-holders thereof, being an entity independent of share-holders with a *juristic* but not a physical existence. A firm, on the other hand, is not an entity or a person apart from its partners.

(2) 'Partnership' is an arrangement between definite individuals bound together by a contract, while a 'company' is a partnership which is constantly changing, i.e., a succession of partnerships.²

(3) A company's property belongs to the company and not to the share-holders thereof, while the partnership property is the property of the individual members, who are collectively authorised to it.³

(4) A firm's creditors can proceed against the property of the partners, but the creditors of a company can proceed only against the company as such.⁴

(1) 1897 A. C. 22.

(2) *Smith v. Anderson*, 15 Ch. D. 273.

(3) *George Newman and Co.*, *In re*; (1895) 1 Ch. 674.

(4) *Flit Croft. In re*: 21 Ch. D. 583.

(5) A share-holder can enter into a contract with the company while a partner cannot do so with his firm.

(6) A share-holder of a company cannot, unlike a partner of a firm, incur liabilities on company's behalf. For income-tax purposes the main distinction between a company and partnership will be clear from the following observation of *Schwabe C. J.* 4-a :—"It is argued by the Commissioner that partnership is, for Income-tax purposes, an entity; but it is not an entity known to law; it is not a separate entity like a company limited by shares; its name is merely a convenient method of describing its partners each of whom is jointly and severally liable for its debts and liabilities for income-tax purposes. It is a convenient body to assess, at the partners carry on trade together and keep books in which the partnership transactions are entered, and earn together profits and make losses. It is to be observed that for this purpose no distinction can be made between registered and unregistered firms, for, whether a firm is a legal entity or not, does not depend on registration. A company being juristic person, is an assessee with Section 2 (2), and as such chargeable to income-tax and super-tax under the Finance Act. See also under Sections 3s. and 55* *infra*, and notes under Sections 8 to 14 and for *refund* Section 48 *infra*. Be it noted in this connection that while a company has the apparent disadvantage of being assessed at the maximum rate, it has advantages also. A share-holder can apply for the winding up of a company under Section 166 Companies Act. Then, the liabilities are limited to the extent of shares; there is a regular audit of accounts, a publicity of business and a corporate finance. Above all, there is the provision for refund in case of share-holder receiving any dividend, in certain cases. Before parting with the subject of a 'company' with relation to its taxation, be it noted also that a company in liquidation is a company within the meaning of the Act ⁵ while an official liquidator of a company is bound by the assessment made on the company before the order of its winding up. ⁶

* (4-a) I. I. T. C. 278.

(5) Commr. I. T. v. Agra Spinning and Weaving Mills (in Liqdn.) 16-A. 685 1984 All. 170: 1984 I. T. R. 79.

(6) I. T. Commissioner U. P. v. Lucknow Sugar Works, 1986 I. T. L. J. 29.

* Income-tax Act 1922.

Any foreign association :—

The object of the addition of this part of definition of the company is to include in the term 'company', such foreign association as the Central Board of Revenue may desire to treat as companies for the purposes of the Act. The expression, 'for the purposes of the Act' would mean for the purposes of taxation to Excess Profits Tax under the Act. The words, "or of a law of an Indian State" in the definition of company have been added by the Select Committee. They observe:—"In the definition of Company in sub-clause (8) we have inserted a reference to Companies formed in pursuance of legislation in Indian states."

(9) **Deficiency of profits:**—The definition of the expression "deficiency of profit" also follows the English law, as contained in Section 15, Part III, Finance Act 2 of 1939. According to the above, the amount of deficiency occurring in any chargeable accounting period shall be taken to be :

- (a) Where profits have been made in the period, the amount by which those profits fall short of standard profits ;
- (b) Where a loss has been sustained in the period the amount of loss added to the amount of standard profits. Thus 'deficiency' is either:—

(1) An amount of profits smaller than the standard profits or (2) a loss sustained, in the period. The amount of deficiency depends upon whether there have been a decrease in profits or whether there has been a loss in the chargeable accounting period under consideration. Under the English law, relief is allowed on the deficiency of profits in accordance with the provisions contained in Part III, Section 15 (2). Similarly, relief is to be afforded in India on the same principle and according to similar provision as contained in Section 7, *post*.

10. **Director**—The definition of the term "director" is the same in this Act, as given in Companies Act (1913)

Section 2 (5) read with Sections 2 (9), 2 (9-A) and explanation to Sections 2 (9-A) (Amended 1936).

These Sections are:—

Section 2 (5) 'Director' includes any person occupying the position of a director by whatever name called:—

Section 2 (9) 'Manager' means a person who, subject to the control and direction of the directors, has the management of the whole affairs of a company, and includes a director or any other person occupying the position of a manager by whatever name called and whether under a contract of service or not.

Section 2 (9-A) 'Managing Agent' means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement and includes any person, firm or company occupying such position, by whatever name called.

Explanation—If a person occupying the position of a Managing Agent calls himself a manager he shall nevertheless be regarded as Managing Agent and not as manager for the purposes of this Act.

(11) **Dividend:**—The definition of the term "dividend" has for the purposes of this Act, been adopted from the Income Tax Act, 1922 (Amended, 1939). The definition therein has been added by the 1939 Amending Act. It runs as follows:

Section 2 (6-A) 'dividend' includes:—

(a) *any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company;*

(b) *any distribution by a Company of debentures or debenturestock, to the extent to which the company*

possesses accumulated profits, whether capitalised or not;

- (c) *any distribution made to the shareholders of a company out of accumulated profits of the company on the liquidation of the company ;*

Provided that only the accumulated profits so distributed which arose during the six previous years of the company preceding the date of liquidation shall be so included; and

- (d) *any distribution by a company on the reduction of its capital to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not;*

Provided that 'dividend' does not include a distribution in respect of any share issued for full cash consideration, which is not entitled, in the event of liquidation, to participate in the surplus assets, when such distribution is made in accordance with sub-clause (c) or (d).

Explanation.—The words 'accumulated profits,' wherever they occur in this clause shall not include 'capital profits.'

The above definition of 'dividend' has been added to the Income tax Act to prevent avoidance of super-tax

Section 2 (6-A) :—Section 2 (6-A) is new and has been added to prevent avoidance of super-tax. "To prevent the avoidance of super-tax which would otherwise be payable by the shareholders by the device of distributing the profits in the form of bonus shares, bonus debentures or some other form which, as the law stands at present, are capital receipts and not income in the hands of the share-holders, dividend is defined in such a way

that wherever the share-holders receive profits in any of such forms it can be treated as income for tax purposes. The definition also covers the case where a company goes into liquidation and the accumulated profits are distributed by the liquidator to the former share-holders. Income is then defined in Section 2, clause (6-C) to include any dividend as defined in Section 2, clause (6-A), and also to include distributions from unrecognised Provident Funds."

Under the amended definition a debenture will, when issued, be treated as a dividend but an ordinary bonus share will not be liable to taxation until it is actually paid off. The definition further secures that accumulated profits distributed on the liquidation of the company shall only be included in dividend for the purposes of taxation, if they arose within six years of the liquidation. Clause (d) of the revised definition provides for the case in which a company tries to disguise a distribution of profits as a reduction of capital. The words inserted in the new sub-clause (c) of clause (ii) of Section 2 of the Act by clause 2(c) (iii) of the Bill merely make correction overlooked in the Bill, and necessary in view of the revised wording of Section 10 of the Act." (*Select Committee Report, 1938*).

Provision as to avoidance of super-tax exist in the English law also. (Section 21, Finance Act, 1922).

Regarding dividend, the Enquiry Committee observed "We have considered the clause in the Dividend Duties Act, 1902, of Western Australia which defines a dividend as follows:—"a 'dividend' shall include every dividend, profits, advantage or gain, intended to be paid, credited to or distributed." This wording was held by the Privy Council to cover an issue of bonus shares and we suggest that the same definition be applied to dividends in the Indian Income Tax Act. In the Assembly also, the question of defining 'dividends' was-discussed:—"The very first matter on which there was a considerable amount of controversy was what you may call the technical or the artificial definition of 'dividends.' I call it artificial because my Honourable friend himself pointed out that to a

large extent what might be called dividend, according to the ordinary company law, does not seem to satisfy his greed. He feels that by processes known to tax-dodgers, as he would call them, a certain amount of money which ought to pay tax has hitherto escaped, and he suggested a definition which we thought was a little too wide and it has now been modified in the light of the discussions. The result of these discussions has been to differentiate in the artificial definition which he had proposed between what may be called a genuine addition to the capital of the company as distinguished from cash returns to the shareholders themselves from the accumulated undistributed profits. It does not matter whether the cash is in the form of actual cash or whether it takes the form of debentures to be redeemed in course of time. The latter will be subject to a tax. I commend to the House that the result of the deliberations has been a fair one in so far as the taxation on the distribution of accumulated dividends is concerned.....the present definition of the dividend, artificial though it must be, is acceptable from the point of view both of the State as taking the tax and the individual as having to bear it. (*Mr. Bhulabhai J. Desai*).

Proviso 2 & Explanation.—Proviso 2 was added and "Part (d) of this sub-section makes it clear that if a company has undistributed accumulated profits it cannot distribute ordinary capital and retain its profits: that of course is perfectly just; but the preference shares in a company have no right to participate in those undistributed profits: they are only entitled in the event of liquidation to get their own capital value back: and we consider there should be a distinction drawn between the ordinary share and the preference share which is not entitled in the event of liquidation to participate in any of the surplus profits."

12. Excess Profits Tax Officer.—An Excess Profits Tax Officer shall be the same person under this Act as the Income-tax Officer under the Income tax Act [see Section 3 (2) *post*] Income tax Officers are appointed under Section 5 (d) Income tax Act, 1922. They are the assessors *i.e.* officers who assess income-tax.

13. Income:—The definition of the term 'income' has also been adopted from the 1922 Income-tax Act (Amended 1939). The definition of the term 'income' has been added to the Income-tax Act, by the Amending Act, 1939. This is Section 6-C of the Act which is as follows:—

(6-C) income includes anything included in 'dividend' as defined in clause (6A) and anything which under Explanation 2 to sub-section (1) of Section 7 is a profit received in lieu of salary for the purposes of that sub-section and any sum deemed to be profits under the second proviso to clause (vii) of sub-section (2) of Section 10 and the profits of any business of insurance carried on by a mutual insurance company computed in accordance with rule 9 in Schedule;)

What is income?—The Income-tax Acts make no attempt to provide a definite solution to the query for the same reason that the school-master does not define reprehensible conduct for the benefit of his pupils. Like the school-master, the Acts give us a number of hints and these enable us to say with regard to a large number of items whether they are or are not chargeable to income-tax of the United Kingdom. The exact boundary line between income chargeable and not chargeable to United Kingdom tax has never been drawn and from the nature of the case is never likely to be. The question is primarily one of fact.¹ 'Similarly, in India, the object of the Indian Income Tax Act is to tax 'income,' a term which it does not define. It is expanded, no doubt, into income, profits and gains, but the expansion is more a matter of words than of substance. Income in this Act connotes a periodical money return 'coming in' with some sort of regularity, or expected regularity, from definite sources. (The sources of taxable income are enumerated in Section 6 of the Act). The source is not necessarily one which is expected to be continually productive but it must be one whose object is the production of a definite return excluding anything in the nature of a mere wind-fall. Thus income has been likened pictorially to the fruit of a tree or crop of field. It is essentially the produce

1. *Sum Insurance office v. Clark* 6 T.C. 59 (See also *Pearn v Mille* 6 A.T.C. 519; *Hudson Bery Co. v. Stevens* 5 T.C. 417)

of a thing which is often loosely spoken of as 'Capital'.² Without giving an exhaustive definition, it (income) may be described as the annual or periodical yield in money or reduceable to a money value arising from the use of real or personal property or from labour or services rendered (bearing in mind that in some cases, *i. e.*, income derived from house property, the yield must be taken as the *bona fide* annual value and not necessarily as the actual yield. Investments and rents derived from houses and lands are instances of income arising from the use of property, while salary, wages and professional earnings, including pensions, are instances of income arising from labour or services rendered. Income derived from business may, in some cases, be a combination of both classes.³ Income means what comes in.⁴ There must be an 'incoming' to satisfy the test of 'income'.⁵

The same view of the term 'income' was taken by *Das, J.* in another Patna case, *Raghunandan Pershad Singh v. Commissioner I. T. B. & O*⁶ Any thing which can be properly described as income is taxable under the Act unless expressly exempted.⁷

Although the words 'income of' are simple words, capable of wider or narrower meaning, yet for the purposes of Sections 3 and 55 'income' is not to be attributed to any of the five classes of persons mentioned by any loose or extended interpretation of the words but only where their application is warranted by ordinary legal meaning.⁸

'Income' signifies what comes in¹; it is as large a

(2) (Per Sir George Lowndes in the Commissioner of I. T. Bengal v. Shaw Wallace & Co. 50 I. A. 206, 59C. 1343; 6 I. T. C. 178 (180) Quoted with approval in *Gopal Saran Narain Singh v. Commissioner I. T. B. & O.* 8 I.T.C. 314).

(3) *Raja Joti Persad Singh Deo*, 1 I. T. C. 103 (106); 1921 Pat. 81; 6 P. L. J. 62.

(4) Per Spencer J. in *Narasimal v. Secretary of State for India in Council*, 1 I. T. C. 10 (11) 30 M. 585.

(5) Per *Das J.* in *Maharajadhiraj of Darbhanga v. Commissioner I. T., B. & O.* 4 I. T. C. 283 (304); 9 P. 210; 1930 Pat. 81.

(6) 4 I. T. C. 123 (133) 9 P 48.

(7) *Gopal Saran Narain Singh v. Commissioner of I. T., B. & O.* 8 I. T. C. 340; (344) 1935 I. T. R. 287 (212); 1935 P. C., 143. 63 I. A. 217 (Quoting with approval in *Shaw Wallace & Co. v. I. T. C. Bengal* 6 I.T.C.128).

(8) *Kalyanji Vithal Das v. Commissioner I. T. Bengal* 1937 I.T.C. Bengal, P. C. 36.

(1) *Jones v. Ogle* (1872) 42 L. J. Ch. 396.

word as could be used to denote a man's receipts.² Income means money or money's worth received by a person and money worth must be something which can be turned into money.³ The Dictionary meaning of the term 'income' means periodical, (usually annual) receipts from one's business, lands, work, investment etc.,⁴ and the same is the legal acceptance of the term according to *Stroud's Judicial Dictionary*. When the Act, by Section 3, subjects to charge 'all income' of an individual, it is what *reaches the individual* as income which it is intended to charge.⁵ A contrary view was, however, taken by the Judicial Commissioner's Court, Nagpur, in *Pandurang v. Commissioner I. T. C P.*⁶ In view, however, of the P. C. ruling in *Raja Bejay Singh Dudhuria's* case above cited (6 I. T. I. C. 449, 452) and other leading cases on the point of 'income', decided later by the Privy Council, the current and the accepted view of 'income' is that, for assessment purposes, there must be an actually realized or realizable profit or gain. Acceptance of new mortgage in discharge of the prior one, including interest due thereon,⁷ or of a promissory note⁸ is not, therefore, 'income' assessable. Where payment is received in kind, for the receipt to be taxable it is essential that what is received in kind should be equivalent of cash or should be money's worth.⁹ In case of a mortgagee purchasing at Court-sale property, the subject of mortgage, there is a realization of interest to the extent the purchase price exceeds the principal sum due.¹⁰ It may be noted that in *S. M. Chitnavis v. Commissioner I. T. Nagpur*¹¹ and in

(2) In re: Huggins (1882) 51 L. J. Ch. 938.

(3) *Tenant v. Smith* (1892) A. C. 150.

(4) *Oxford Concise Dictionary*.

(5) *Raja Bejay Singh v. Commissioner I. T. Bengal*, 6 I. T. C. 449 (451-52 P. C.)

(6) 2 I. T. C. 69: 1926 Nag. 180.

(7) *Raghubir Pershad v. Commissioner. I T., B. & O.* 1933 P. C. 101. 1933 I. T. R. 118: 1933 A. L. J. 567: 6 I. T. C: 392 (396-97).

(8) *Commissioner I. T., B. & O. v. Rameshwar Singh (Raja)* 12 P. 31 1933 P. C. 108: 1933 I. T. R. 94: (P. C.): 6 I. T. C. 401 (P. C.)

(9) *Ibid* (both cases).

(10) *Commissioner I. T. B. & O. v. Rameshwar Singh (Raja)*, 6 I. T. C. 401 P. C.): 1933 P. C. 108.

(11) 1929 Nag. 50: 3 I. T. C. 321.

Nanhe Lall v. Commissioner I. T. Nagpur, 12 the Nagpur Judicial Commissioner's Court also shared the Privy Council's view, holding that a mere credit of interest in the Khata, not shown to have been realised, did not make it taxable income. (*Al. Ar. Rm. Arunahalam Chettiar v. Commissioner I. T. Madras*,)¹³ the Madras High Court also, reviewing the English and Indian law on the point, held that the money which became due by way of interest, but which was not realized, was not taxable. Hence 'income' to be taxable means 'actual receipts.'

(14) **Fixed rate**—The definition of the term:—The definition of the "fixed rate" has references only to dividends on share capital other than ordinary share capital. If a rate fluctuates in accordance with the maximum rate of income-tax, that is included in the term 'fixed rate' for the purposes of Excess Profits Duty. The definition of 'fixed rate' as given in the Act has been taken from the English Finance Act, (2) 1939, Section 22 Part III.

(15) **"Inspecting Assistant Commissioners"**:—The Inspecting Assistant Commissioners under the Excess Profits Duty Act shall be the same persons who are Inspecting Assistant Commissioners under the Income Tax Act, *vide* Section 3 (2) *infra*. For Inspecting Assistant Commissioners see Section 5 (5) I. T. Act 1932 (Amended 1939) which specifies the functions of the Inspecting Assistant Commissioners under the Income-tax Act. It is as under:—

(5) (*Inspecting Assistant Commissioners of Income-tax and Income-tax Officers shall perform their functions in respect of such persons or classes of persons and of such incomes or classes of income and in respect of such areas, as the Commissioners of Income-tax may direct, and, where two or more Inspecting Assistant Commissioners of Income-tax or Income-tax Officers have been appointed for the same area, in accordance with any orders which the Commissioner of Income-tax may make for the distribution and allocation of the work to be performed. The Commissioner may, with the previous approval of the Central Board of Revenue, by general or special order in writing,*

(12) 1928 Nag. 241: 3 I. T. C. 28.

(13) 44 M. 65: 59 I. C. 482.

direct that the powers conferred on the Income-tax Officer and the Appellate Assistant Commissioner by or under this Act shall, in respect of any specified case or class of cases, be exercised by the Inspecting Assistant Commissioner and the Commissioner, respectively, and, for the purposes of any case in respect of which such order applies, references in this Act or in any rules made hereunder to the Income-tax Officer and the Appellate Assistant Commissioner shall be deemed to be references to the Inspecting Assistant Commissioner and the Commissioner, respectively.)

(16) **"Loss"**:—"Loss" and 'Profits' are relative terms. 'Profits,' as defined in clausd (2) of the Section, are to be determined with reference to the Rules given in Schedule 1 to the Act and 'losses', for the purposes of the Act, are to be determined also in the same manner. Under the English Finance Act (2) of 1939, also, profits and losses are to be similarly computed. (*vide* Section 14 (1) and (3) Part 111 Finance Act, 1939.

17 **"Person"**:—The definition of the term 'person', as given here, is the same as the one in the Income-tax Act, 1922, except that the words, "*and local authority,*" added to the Income-tax Act definition by the 1939 Amendment Act, does not find place here.

While 'local authorities' have in some cases, been made subject to the payment of Income tax they, stand exempted from the payment of the Excess Profits Tax. The term "person" here shall have the same meaning, therefore, as in the Income Tax Act (but for the above exception). In the Income Tax Act, the term "person" includes a *juristic person*. A minor, a lunatic, and a person residing abroad have been treated as persons under the Act, special machinery having been provided for their taxation, (see Sections 40 to 42 of the Act). In cases where a minor makes an income and he has no guardian he can be called upon to make a return of his income personally and to pay the tax assessed. "Person" has been held to include any body of persons, corporate or incorporate."

(18) **Prescribed**:—The term “prescribed” has reference to rules under the Act. Provisions as to Rules under the Act are contained in Section 26 of the Act.

See notes under Section 26 *post*.

(19) **Profits**:—As already stated under ‘Loss’ above, ‘Profits and losses’ under the Act are to be computed in the same manner. The manner of computing profits is to be found in the first Schedule.

See notes under Rules in the first Schedule, *post*.

(20) **“Standard Profits”**:—The methods of determining ‘standard profits’ is given in Section 6 below.

The English law as to ‘standard profits’ is contained in Part III, Section 13, details whereof have also been given under Section 6 below. See notes under Section 6 *post*.

(21) **“Statutory percentage”**:—The definition of the term “statutory percentage,” as given here, has been taken bodily from the English law [Section 13 (9) Finance Act 1939.] The ‘statutory percentage’ is to be applied in determining the ‘standard profits’ in certain cases, as given in Section 6 *post*.

Amongst the objections to the provisions of the Excess Profits Duty Bill raised at the time of discussion in the Assembly, before its enactment into law, the one related to the rate of ‘statutory percentage’ having been copied from the English provisions, regardless of the difference in the circumstances of the United Kingdom and India.

For further details see notes under Section 6 *post*.

(22) **Written down value**:—The definition of the expression ‘written down value’ as given in the Act, is nearly the same as in the Income Tax Section 10 (VI). The expression has been substituted for the words ‘original cost’ (now dropped).

In the Income Tax Act, the substitution and the change is the outcome of the recommendations of 'Enquiry Committee'. They observed :—"We recommend therefore the amendment of Section 10 (2) (vi) of the Act on the following lines :—

In respect of depreciation of such buildings, machinery, plant or furniture, being the property of the assessee, a sum equivalent to such percentage on the written down value thereof as may, in any case or class of cases, be prescribed, but not exceeding the amount actually written off in the books of the assessee; provided that where the aggregate allowances from the commencement of the Act upto and including any year, do not exceed the aggregate of the sums written off in the books of the assessee for the same years, the limitation shall not be applied".

Written-down value thereof:—These words have been substituted for the words 'original cost' (now dropped). The amendment is the outcome of the recommendation of the Enquiry Committee. "We recommend therefore the amendment of Section 10 (2) (vi) of the Act on the following lines :—

"In respect of depreciation of such buildings, machinery plant or furniture, being the property of the assessee, a sum equivalent to such percentage on the written down value thereof as may in any case or class of cases, be prescribed, but not exceeding the amount actually written off in the books of the assessee, provided that where the aggregate allowances from the commencement of this Act upto and including any year, do not exceed the aggregate of the sums written off in the books of the assessee for the same years, this limitation shall not be applied."

"Written-down value" means :

- (a) in the case of assets acquired in the 'previous year' the actual cost to the assessee ;
- (b) in the case of assets acquired before the 'previous year' but after the coming into operation of the

amended Section, the actual cost to the assessee less all depreciation allowed to him under this Section ;

- (c) in the case of assets acquired before the coming into operation of the amend Section, the actual cost to the assessee less (i) for all years for which he has been assessed in respect of the business, all depreciation which has been calculated as allowable in respect of those years whether effectively allowed or not, and (ii) .for all years for which he has not been so assessed, depreciation calculated under the provisions of Section 10, at the rates in force for those years, but, for any year prior to the coming into operation of the Income-tax, 1932 at the rates in force on 1st April, 1922. "

The Enquiry Committee also, in changing this basis from 'original cost' to 'written down value' in computing depreciation or obsolescence, observes:—"The first question for consideration is whether the allowance should be calculated as now upon the basis of cost, or whether it would be better to change over to calculations based on the written down value, *i.e.* the original cost less year by year the depreciation previously allowed. The following example illustrates the difference between the two methods :—

	Cost method.		Written down value method.
Year 1, original cost	10 000	20% on written	10 000
Allowance 15% on cost	1,500	down value	2,000
	<hr/>		<hr/>
Year 2, written down value	8,500	"	8 000
15% on cost	1,500		1,600
	<hr/>		<hr/>
Year 3	7,000	"	6,400
15% on cost	1,500		1,280
	<hr/>		<hr/>
Year 4	5,500	"	4,120
15% on cost	1,500	"	824
	<hr/>		<hr/>
Year 5, written down value	4,000		3,296

The system at present operation makes it a matter of

great difficulty to keep track of the various items of plant purchased at different dates and of the years in which they should drop out of the depreciation computations by reason of the full 100 per cent. allowance having already been made. We have found that in practice the depreciation records on the files are often complicated, so that the position is not at all clear and involves much discussion and research. The written down value basis automatically secures that the aggregate allowance can never exceed 100 per cent. Moreover, the necessary calculations are simpler and more easily followed with a corresponding saving of time even after allowing for the more detailed statements necessary in connection with an obsolescence claim.

On theoretical grounds, there is at least as much to be said for the written-down value basis as for the present basis, but no method has been found which gives universally satisfactory results. This is evident from the recurrent discussions in professional journals and technical publications, but the United Kingdom Royal Commission on Income-Tax, 1920, after full consideration, reported definitely in favour of the written down value basis. Obviously higher percentage rates would be necessary under the written down value basis to give corresponding results and this should be borne in mind when the rates are being revised as recommended in paragraph (e) of this Section of our Report, but this does not necessarily mean an increase in all the existing rates because some of them appear to us to be much too high already.

A further point for consideration is the fact that, however, carefully the prescribed rates of depreciation are arrived at, such rates at the best can only be fair averages for the various classes of plant, etc., and must either more or less than the rates of depreciation actually suffered in many cases. Where the prescribed rate is inadequate, a remedy is provided by the obsolescence allowance. [See paragraph (g) of this Section].

To meet the case where the rate is excessive, we suggest as a safeguard that the allowance should not exceed that which the assessee has actually written off in his books.

The amendment alters the basis upon which depreciation allowance is to be calculated from the 'original cost' to the original cost less the sums previously allowed for depreciation, and except in the case of unabsorbed depreciation which the assessee is entitled at the commencement of the amending Act to carry forward to a succeeding year, it treats depreciation on the same footing as any other expense of the business. Consequently depreciation for any year subsequent to the commencement of the amending Act can only be carried forward for as long as any other loss can be carried forward. But the unabsorbed depreciation at the commencement of the amending Act may be carried forward until fully allowed and is to be allowed before the depreciation due in respect of subsequent years.

It is found in practice that frequently the assessee writes off in his accounts much less than the amount of depreciation at the prescribed rates. Proviso (b) to Section 10 (2) (vi) has therefore been amended so as to restrict the allowance for depreciation to the amount written off in the assessee's accounts. In this connection the Select Committee observed: "It has the effect of altering the proposals relating to depreciation which were contained in the Bill. Taken along with the second proviso now added to the definition, contained in sub-section (5) of Section 10 of the Act, of the words 'written down value' this alteration substitute-for the proposals regarding depreciation contained in the Bill provisions which remove the restriction of depreciation to the amount written off in the books of the assessee, remove the restriction to six years of the carry forward of the depreciation, and secure that depreciation which is unabsorbed at the time when the law is changed, shall not be deducted from the original cost of plant, machinery, etc. in arriving at the written down value. The effect of this provision is to spread the writing-off of the unabsorbed depreciation over a longer period. The proposals contained in the Bill limited the amount of depreciation to the amount written off in the books of the assessee and treated depreciation arising after the change of the law as a loss like other losses, so that it could be carried forward only for six years. Depreciation unabsorbed at the time

of the change of the law was to be carried forward without time limit until it was absorbed but was to be deducted from, that is to say allowed against, profits before any further allowance for depreciation was to be made for any particular year subsequent to the change of the law.

Government have given us an assurance that the new rates consequent on the change from the cost basis to the written down basis will be discussed with the interests concerned before they are fixed, and that the new provisions will not be brought into operation until the rates have been so fixed".

Section 3. *(1) There shall be the following classes of Ex-*
cess Profits Tax Authorities for the purposes of this,
Act namely:—

**Excess
profits tax
authorities**

- (a) *the Central Board of Revenue ;*
- (b) *the Commissioners of Excess Profits Tax ,*
- (c) *Assistant Commissioners of Excess Profits Tax,*
who may be either Appellate Assistant Commis-
sioners of Excess Profits Tax or Inspecting
Assistant Commissioners of Excess Profits Tax :
- (d) *Excess Profits Tax Officers ;*
- (e) *Board of Referees.*

(2) Every Commissioner of Excess Profits Tax, Appellate Assistant Commissioner of Excess Profits Tax, Inspecting Assistant Commissioner of Excess Profits Tax and Excess Profits Tax Officer shall be a person who is exercising the functions of Commissioner of Income-tax, Appellate Assistant Commissioner of Income-tax, Inspecting Assistant Commissioner of Income-tax and Income-tax Officer, respectively, under the Indian Income-tax Act, 1922.

(3) The Central Board of Revenue shall, subject to the provisions of sub-section (2), appoint such persons as Commissioners of Excess Profits Tax, Appellate Assistant Commissioners of Excess Profits Tax, Inspecting Assistant Commissioners of Excess Profits Tax and Excess Profits Tax Officers as it thinks

fit and such persons shall perform their functions in respect of such cases as the Central Board of Revenue may assign to them :

Provided that such directions shall be made entirely at the discretion of the Central Board of Revenue, and, in particular, it shall be competent for that Board to assign a case or class of cases to an officer who is not exercising in respect of that case or class of cases the corresponding functions in relation to the charge of income-tax under the Indian Income-tax Act, 1922.

(4) All officers and persons employed in the execution of this Act, shall observe and follow the orders, instructions and directions of the Central Board of Revenue :

Provided that nothing in this sub-section applies to a Board of Referees :

Provided further that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions.

(5) A Board of Referees shall consist of not less than three and not more than five persons, of whom not less than one half shall be non-officials having business experience, and one shall be a judicial officer who has exercised the powers of a District Judge or who possesses such qualifications as are normally required for appointment to the post of District Judge, and who has held judicial office for a period of not less than ten years.

(6) Subject to the provisions of sub-section (5), the Central Government may make rules regulating the formation, composition and procedure of Board of Referees.

Section 3 Sub-section (1):—The Act provides for its administration by the officers of the Income-Tax department under the Central Board of Revenue. As such, with the exception of the 'Board of Referees' the enumeration of Excess Profits Tax Authorities, as given in this sub-section, is the same in this Act as of the Authorities under the Income-tax Act, 1922 (amended 1939) (Section 5 Income tax Act).

Section 3 (2):—By sub-section (2) of this Section, all the income-tax authorities under the Income-tax Act, 1922, are to be authorities *ex-officio* for the purposes of Excess Profits Tax Act; for instance, every Commissioner of Excess Profits Tax shall be a person who is exercising the functions of Commissioner of Income tax under the Indian Income Tax Act, 1922.

Sub-Section 3):—The appointment and functions of Commissioners of Excess Profits Tax, Appellate Assistant Commissioners of Excess Profits Tax and Inspecting Assistant Commissioners of Excess Profits Tax and Excess Profits Tax and Income tax Officers are to be regulated by the Central Board of Revenue.

According to the proviso to this sub-section, the direction as to the functions to be assigned to the above mentioned officers is a matter left entirely to the discretion of the Central Board of Revenue.

In particular, as apart from the generality of the above provisions, the Board is given the power to assign a case or class of cases to an Excess Profits Tax Officer who may not be exercising corresponding functions and powers under the Income tax Act with respect to that case or class of cases.

Sub-Section (4):—Sub-section (4), in particular, again enjoins upon all the Excess Profits Tax Commissioners, Excess Profits Assistant (Appellate and Inspecting) Commissioners and Excess Profits Tax Assessing Officers to obey and follow the orders, instructions and directions of the Central Board of Revenue.

Sub-Section (5):—The Board of Referees is an addition to the authorities as existing under the Income-tax Act. This Board of Referees is to consist, according to sub-section 5 of Section 3 of the Act, of:—

• (1) not less than three and not more than five members;

(2) half of the above number to be non-officials with business experience;

(3) One is to be a judicial officer of a rank not inferior to that of Subordinate Judge or Judge Small Cause Court, having held judicial office for a period of not less than ten years.

Sub-Section (6):—Under sub-section (6), the Central Board of Revenue is to make Rules regulating the formation, composition and procedure of the Board of Referees.

As to the functions of the Board of Referees, see also Section 6(3) and Section (5) proviso. As the functions under the Income Tax Act were, prior to the enactment of the 1922 Act, performed by Revenue Authorities no separate enumeration of authorities existed in the Excess Profits Duty Act of 1919. The Collector of the district was to perform the function, of the Assessing Officer.

An appeal from the Collector's decision lay to the Chief Revenue Authority or to the Board of Referees (under Section 8 of the Act). The Board was to consist of 3 or 4 persons, one being Chairman; in the latter case, two of the members were to be non-officials, with business experience and the opinion of the majority was to prevail in case of difference of opinion.

In the case of a Board of four, the Chairman's vote was to be the casting vote, if the members were equally divided. The opinion of the Chief Revenue Authority or of the Board was to be final (under Section 8).

Section 4. *Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid, on the amount by which the profits during any chargeable accounting period exceed the standard profits, a tax (in this Act referred to as "excess profits tax") which shall, in respect of any chargeable accounting period ending on or before the 31st day of March, 1941, be equal to fifty per cent. of that excess and shall, in respect of any chargeable accounting period beginning after that date, be equal to such percentage of that excess as may be fixed by the annual Finance Act:*

Charge of tax.

Provided that any profits which are, under the provisions of sub-section (3) of Section 4 of the Indian Income-tax Act, 1922, exempt from income-tax, and all profits from any business of life insurance shall be totally exempt from excess profits tax under this Act.

Section 4:—Previous Law:—Section 4, Act 10 of 1919 contained the corresponding provisions.

Only, the proviso to the said Section was different from the proviso to the present Section 4, which relates to a different subject.

Analagous Law:—Section 3 of the Income Tax Act, 1922 (amended 1939) contains similar provisions. The corresponding English law is contained in Part III, Section. 12 (1) Finance Act (2) of 1939. (See Part III of the book.)

Scope of Section 4:—Section 4 may well be said to be the charging Section in the Act. It points out on what and for what period is the Excess Profits Tax to be charged and also indicates proportion or amount of tax as regards the excess profits. The proviso to the Section points out that all profits or income exempt from income tax under the Indian Income-tax Act shall also be exempt from this *i.e.*, Excess Profits Tax.

Excess Profits Tax, under the Section, is to be assessed for 'Chargeable accounting period' [as defined in Section 2]. And, as the chargeable accounting period is to begin from 1st. September 1939, the tax is, in effect, to begin from that date. It means that profits from the period starting from 1st. September 1939 are to be taken into account for the purposes of computation of excess profits chargeable to the tax.

The tax is to be charged on the excess amount, by which the profits in a chargeable accounting period exceed the standard profits of the business. The amount of tax is to be 50% *i.e.* half of the above-mentioned profits.

Subject to the Provisions of this Act:—These words are the usual qualifying words, being general in their nature. Excess Profits Tax is to be charged, levied and recovered but in accordance with the provisions contained in the various Sections (following Section 4) of the Act. For instance, standard profits, for the purpose of finding out the excess amount of profits chargeable, are to be determined in accordance with the provisions of Section 6 of the Act. Any determination of excess profits chargeable is, again, open to appeal under Section 17 of the Act.

This explains how the charge to Excess Profits Tax to be made under the Act is subject to the provisions of the Act.

Any business to which this Act applies:—The succeeding Section (Section 5) points out to what businesses the Act applies *i.e.* the profits of what business or businesses are assessable to Excess Profits Tax.

The comprehensive words of Section 5 are quite embracing and wide enough to cover every businesses, For further reference in this connection see notes under Section 5 *post*.

Charged, levied and paid:—The combination of these three words is meant to indicate the various stages of an imposition by the State. The terms 'charge' indicates liability; 'levying' will be an expression or indication of the liability and 'paid' is, of course, recovery or the final stage in the case of an imposition. It is a discharge of a liability as determined in accordance with law.

Chargeable accounting period:—See notes under Section 2 (6) *ante*.

Standard Profits:—Standard profits are to be determined under Section 6 of the Act. For this, therefore, see notes under Section 6 *post*.

"Which shall in respect of any chargeable accounting period ending on or before the 31st day of March 1941....."
Finance Act:—This part of the section is the result of the change effected therein, by the Select Committee and the drafting improvement made later in the assembly. The change is the result

of the change in the definition of the term "Chargeable Accounting period". In this connection, the Select Committee observed: "The change made in sub-clause (6) has been explained in the general remarks made at the opening of this report. "The effect of the change is that there can be no accounting period after the 31st day of March, 1941, and if the Act is to continue to have effect after that date, steps must be taken to alter the wordings of this sub-clause by an amending Act. The changes are intended to bring the rate of tax imposed by the bill under annual review". (Select Committee).

Proviso:— Provisions of sub section (3) of Section 4 Income Tax Act, 1922 :—Sub-section (3) of Section 4 Income Tax Act, 1922 (amended 1939) exempts no less than nine classes of income from liability to Income tax. These are :—

(1) Income from property held under Trust for religious or charitable purposes ;

(2) Income from the business of a religious or charitable institution.

(3) Income of a religious or charitable institution.

(4) Income of local authorities.

(5) Interest on securities.

(6) Special allowances, perquisites, etc.,

(7) Income of a casual or non-recurring nature.

(8) Agricultural income.

(9) Income of trustees of Provident Fund.

1. Property held under Trust :—Under this head two categories of income are exempt :—

First, income from property which is dedicated absolutely, and, secondly in case of qualified dedication, so much of the income as is applied or finally set apart for application, to religious or charitable purposes. In the case of absolute dedication, *i. e.*, where there is no outstanding secular interest reserved by the trust, the exemption is complete. In the case

of qualified dedication, the trust reserves a secular interest to beneficiaries, *Shebait*s or heirs of the founder, etc. This secular interest is assessable to income-tax. Suppose 60 per cent is under the trust applicable to religious or charitable purposes and 40 per cent distributable among the heirs of the settler. The 40 per cent is assessable. Suppose also that only 50 per cent is actually applied or set apart for religious or charitable purpose and the heirs or the *Shebait*s misappropriate 10 per cent. The 10 per cent is under the Section also assessable.

The maintenance of a *Shebait* may or may not come within the category of religious or charitable purpose. It depends on the circumstances of the case. If, for instance, a dedication is absolute and a small portion of the income is given to the *Shebait* for his remuneration for carrying out the trusts of the endowment, it would not be secular. If, on the other hand, a fixed sum is given to religious or charitable purposes and the residue of the income is given to the *Shebait* for his maintenance, the residue would be held to be secular. The test is whether a suit for partition lies for division of the residue. If it does, then the residue is secular and assessable.

The term 'trust' refers to regular trust. The term 'trust' is not defined in the Income-Tax Act, but it is defined in Section 3, Indian Trust Act (II of 1882) as follows:—"A trust is an obligation on the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another and owner." Obviously, the term 'trust' means not only what are known as 'express' trusts under the law but other trusts also, such as 'executory' trusts, or other obligations in the nature of trust, as provided for by Section 92 to 94 (in fact, Section 80 to 95) of the Trust Act, 1882, based on the maxim of equity that "equity imports an intention to fulfil an obligation."¹² The saving clause in Section 1 of the Indian Trusts Act, 1882, exempts private, religious or charitable endowments from the operation of that Act, though, of course, the principles laid down in that Act may be accepted for guidance under

(12) *Eggar v. Commissioner I. Tax Burma*, 2 I. T. C. 286 (290); 4 R 588: 1927 Rang. 95.

Income Tax Act also. ^{12-a} In *M. Mohd. Ibrahim Raza Malik v. Commissioner I. T., C. P.* ¹³, property was vested in the assessee under a deed of trust but it appeared from the deed that the income was applicable to purposes many of which were neither religious nor charitable; nor was any part of the property set apart exclusively for such purposes. Section 4 (3) (i) was, therefore, held inapplicable by Their Lordships of the Privy Council. Similar in *M. E. R. Malik v. Commissioner I. T. C. P.* ¹⁴ there was no permanent dedication of religious or charitable purposes and no definite part of the property was allocated to such purpose and so the case was held as not falling within the exemption under Section 4 (3) (i). *Eggar v. Commissioner I. T. Burma* ¹⁵ and *Lachhman Dass Narain Dass v. Commissioner Income Tax U. P.* ¹⁶ are cases where, even if a trust was created, the income in question was not income derived from 'property' held under trust (neither salaries, nor trade or business, being 'property') and hence the exemption claimed was not allowed.

"We are far from saying that it is necessary in order to create a trust that the person in whose favour the trust is created should know about it. But at the same time it is a circumstance to be taken into consideration by the Income-tax Commissioner in coming to a conclusion as to whether or not there had been a real dedication and as to whether or not the fund so created or the trust so said to be created can be revoked. This is purely a question of fact." ^{16-a}

Where the trust deed is too vague and wide, some of the purposes being charitable, but others not, exemption under Section 4 (3) (1) is not available. ^{22-a}

Where the trust deed is too vague and wide, some of the purposes being charitable, but others not, exemption under Section 4 (3) (1) is not available."

(12-a) Per Maung Ba J. in *ibid* (page 230.)

(13) 4 I. T. C. 486 (P. C.) 1930 P. C. 226: 57 I. A. 260

(14) 2 I. T. C. 443: 1928 Nag. 10.

(15) 2 I. T. C. 286

(16) 1 I. T. C. 378.

(16-a) Per Beasley J. in *Arunachalam Chettiar v. Commissioner Income Tax, Madras* 3 I. T. C. 88 143.

(1) **Religious or charitable purposes** :—The term 'Religious purpose' has not been defined in the Act, while 'charitable purposes' is. Whether a particular purpose is religious or not, is, after all, a question of fact, depending on the circumstances of each case, on the personal law of the parties concerned and on custom. Under the English law, the promotion of religion has been taken to mean the promotion of spiritual teaching in a wide sense and the maintenance of the doctrines on which it rests and the observances that serve to promote and manifest it, and hence a society formed for purposes of settling Jews in Palestine, with power to own schools, build factories and railways etc., was held not to be charitable.

For the purposes of construing the words "religious or charitable purposes" in the Income-tax Act, it is quite unnecessary to investigate the meaning of the words in the particular system of jurisprudence that may be followed by the assessee.

Personal law of assessee is to be ignored. Under the Indian Law, just as there are a number of things that may be religious so quite a number of objects are charitable. A school, a degree-conferring University, a professorship, construction and maintenance of a well or a cistern for drinking water for men and animals, a dispensary or hospital and giving of alms to or feeding the poor, the *fakirs*, ascetics, traveller and so on, are all common objects of charity. The construction and maintenance of *Dharamshalas* and feeding houses for the poor are also common instances of charity in India.

Sirdar Dayal Singh, a well known altruist of the Punjab created a trust under his will according to which the trustees were to maintain a Paper, (The daily 'Tribune', Lahore), and a Press and were to devote the surplus income if any of the trusts fund in improving the Paper and bringing it on a footing of permanency. There was, at one time, a litigation between the Trustees and the Authors of the Trust and, according to the compromise effected therein, if the Paper was to cease publication at any time, the property then held in trust for the Paper was to go to one of the other trusts (the Dayal Singh College). On being assessed on its income, the Paper claimed exemption

under Section 4 (3) (1) on the ground of the trust for the Paper, (the 'Tribune') being a trust for a charitable purpose. Out of the three Judges constituting the Full Bench, a majority of two, (Young C. J. and Addison J.) held that the Newspaper Trust was not one for charitable purpose. Tek Chand J. (dissentient), held the trust to be one for a charitable purpose.

The finding of the dissenting Judge (Tek Chand J.) was upheld by their Lordships of the Privy Council and the paper held to be a charitable trust.

(1) The words "so held in part only" imply cases of mixed trusts. Where property is held in part only for religious or charitable purposes, a proportionate share of any expenses incurred on management should be considered as applied to those purposes. The expression, "finally," occurring at the end means 'irrevocably.'

(2) **Income from business carried on by a charitable institution.** The provisions relating to such income has been added by the 1939 amending Act. The exemptions in the Act at present do not in terms apply to income from business carried on by religious or charitable institutions though in practice such exemption is given. This amendment gives legal authority for the practice but confines the exemption to cases where the business activities are in themselves a primary purpose of the institution or the work in connection with the business is mainly carried on by the beneficiaries. (Select Committee).

(3) **Income of religious or charitable Institution :—** It means an undertaking formed to promote some defined purpose having in view generally the instruction or education of the public. It is the body (so to speak called into existence to translate the purpose as conceived in the mind of the founder into a living and active principal."^{1-c} Where the persons who actually benefitted by an institution, a Chamber of Commerce, were either its members, or those outsiders who did their business

(1-c) Per Lord Macnaughten in *Mayor of Manchester v. Mc. Adams*
 8 T.C 491

through the Chamber, no object of general public utility, as contemplated by the Act, is being advanced by it. For an institution to be held 'charitable', there must be an element of altruism, that it is to say, the beneficiaries must not be able to claim benefit and where that element is wanting, the institution is not a 'charitable' one within Section 4 (ii) 3 of the Act. Hence, the Hapur Chamber of Commerce was held not to be a charitable institution.² Money kept apart out of the income of foreign business and shown as such in the account books of the said business of the assessee for a temple, and which was spent for the purposes when brought to British India, was held as exempt from assessment under Section 4 (3) (ii).³ The Maharaj Bagh Club, Nagpur whose income was applied to increase the amenities of the club which, though advancing a useful object, did not advance an object of general public utility, was held not to be such an institution.^{3-a}

There are two conditions for exemption under this head:—

(1) contribution to be voluntary. (2) Income to be applied solely to religious or charitable purposes.

(1) **Voluntary Contribution**:—The meaning of the term 'voluntary' has been the subject of discussion under the English Law. In *Commissioner Inland Revenue v. New University Club*,⁴ Smith, J. observed; "It was said that the word 'payment' was synonymous with 'contribution' and that the word 'voluntary' did not mean gratuitous but meant given without compulsion.....In my judgment, what is or is not a voluntary contribution must, in each case, depend, on the object for which and the object to which the contribution is made. In each case it seems to me, it must be a question of fact.....to pay £ 1 to a benefit match of a professional cricketer for his own pocket would, I should say, be a voluntary contribution. To pay £ 1 to get access and right to a special seat upon the ground for the match, I should myself not call a voluntary contribution at

(2) *Chamber of Commerce, Hapur Commissioner I. T.*, U. P. 1936 A. 764 1936 A. L. J. 1066: 1936 A. W. R. 664: 1936 I. T. R. 397.

(3) *P. L. S. P. L. Firm v. Commissioner I. T.*, Madras 5 I. T. C. 50 (54)

(3-a) *The Maharaj Bagh Club Ltd. v. Commissioner I. T.*, C. P. 5. I. T. C. 201 (305)

(4) 2 T. C. 279.

all.....I decline altogether to attempt to give an exhaustive definition of what are or are not funds voluntarily contributed, for if I did I should, as it appears to me, land myself in the same difficulties in which the learned Judge who decided the case in question, as it appears to me, got themselves into". Subscriptions of the members of a club, which they pay to enjoy the amenities of the club are not voluntary contributions.⁵

(2) **Solely to religious or charitable purposes :—**The word 'solely' is practically the same as 'wholly' in Section 4* (3) (i). As such, the cases noted under Section 4 (3) (i) for the term 'wholly' are also applicable hereunder. The case of *Maulana M. E. R. Malack v. Commissioner I. T., C. P.*⁶ and *Dr. Umarbaksh, v. Commissioner I. T. Punjab*⁷ may not be mentioned in particular. The term 'applicable' is apparently wider than the term 'finally set apart for application,' in Clauses (i) and (ii). They are nearly the same overlapping each other and the object of the legislature in enacting these provisions in two distinct clauses is, after all, not very definite except that it be that while clause (i) relates to 'property' clause (ii) relates to 'institutions'.

(4) **Income of Local authorities :—**'Local authority' is defined in Section 3(28) of the General Clauses Act as a Municipal Committee, District Board etc. legally entitled to, or entrusted by the Government with the control or management of a municipal or local fund. While the income of local authorities has always been exempt from taxation in British India, that is not the case in England, where such income is exempt only in respect of profits derived from public service within the territorial limits of the particular local authority.⁸ Income of local authorities from supply of commodity or service in trade outside its jurisdiction is not now exempt.

(5) *The Maharaj Bagh Club Ltd. v. Commissioner I. T. C. P.* 5 I. T. C. 201 (205)

(6) 2 I. T. C. 448.

(7) 5 I. T. C. 402.

* Income-tax Act 1922.

(8) *Dublin Corporation v. Mc'Adams* 2 T. C. 887.

"At present all income of local authorities is exempted. If a local authority makes profits from supplying a commodity or service outside its jurisdiction it is considered that exemption should not be given to those profits and this amendment given effect to that view". (Enquiry Committee Report). So such an item is no longer exempt.

(5) **Interest on securities**:—The words "securities" here is to be interpreted as covering all securities mentioned in Section 20, Indian Trusts Act, 2 of 1892 which is as follows :—

Investment of Trust Money:—Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others :—

- (a) in promissory notes, debenture, stock or other securities of any Local Government or of the Government of India, or of the United Kingdom of Great Britain and Ireland ;
- (aa) Provided that securities, both the principal whereof and the interest whereon shall have been fully and unconditionally guaranteed by any such Government, shall be deemed, for the purposes of this clause, to be securities of such Government ;
- (b) in bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India ;
- (B) Provided that, after the fifteenth day of February, 1916, no money shall be invested in any such annuity being a terminable annuity unless a sinking fund has been established in connection with such annuity ; but nothing in this proviso shall apply to investments made before the date aforesaid ;

- (c) (bb) in India three and a half per cent stock, India three per cent stock, India two and a half percent stock or any other capital stock which may at any time hereafter be issued by the Secretary of State for India in Council under the authority of an Act of Parliament and charged on the revenues of India ;
- (c) in stock or debentures of, or shares in, Railway or other Companies the interest whereon shall have been guaranteed by the Secretary of State for India in Council (d) or by the Government of India (d) (e) or in debentures of the Bombay (f) Provincial (f) Co-operative Bank, Limited, the interest whereon shall have been guaranteed by the Secretary of State for India in Council.
- (g) (d) in debentures or other securities for money issued, under the authority of any Act of a Legislature established in British India, by or on behalf of any Municipal, body, Port Trust or city Improvent Trust in any Presidency town or in Rangoon Town, or by or on behalf of the trustees of the port of Karachi.
- (e) on a first mortgage of immoveable property situate in British India : Provided that the property is not a lease-hold for a term of years and that the value of the property exceeds by one-third, or, it consisting of buildings, exceeds by one-half the mortgage money ; or
- (f) on any other security expressly authorized by the instrument of trust, or by any rule which the High Court may, from time to time, prescribe in this behalf :

Provided that, where there is a person competent to contract and entitled in possession to receive the income of the trust-property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (d), (e) and (f) shall be made without his consent in writing.

(6) **Special allowances, perquisites etc.**—In order that this exemption should apply, two conditions ought to be fulfilled. The expenses incurred by the employee must be wholly and necessarily incurred in the performance of his duties as an employee; and the allowances or perquisites must have been granted by the employer with the set purpose of meeting the extra expense thus caused to the employee, and that extra expense only. It is thus a question of fact in each case whether house-rent allowance or the value of rent-free quarters is exempt from tax. In the case of salaried persons, before an exemption can be claimed under this head, the expenses must have been incurred not merely 'wholly' or 'solely' but also *necessarily* in the performance of one's duties.

In *Jardine v. Gillispie*¹ the holder of the office of a minister, had to travel in the performance of his duties to more than one place in succession, and expenses were allowed in part, to the extent wholly and necessarily incurred in the performance of his duties. The expenses of an aeroplane pilot for keeping a car to convey him to aerodrome from his home and for a telephone at his house were disallowed². A barrister residing and practising in London, holding the office of Recorder at Portsmouth, was held not entitled to deduct his travelling and hotel expenses to go to and stay at Portsmouth for the purposes of his office as Recorder there at quarterly sessions.³ The term 'incurred' means actually spent or disbursed, and does not include an allowance for loss of time.⁴ Interest on loans borrowed to advance money by a money-lender, to his customers is not deductible under this clause.⁵ The manager of Hathwa *raj* who was in receipt of salary and a sumptuary allowance (admittedly exempt from taxation,) was, in addition, allowed rent-free rooms in the State European guest-house which he occupied with his family and from that situation he was to entertain the Maharaja's guests in a befitting style.

(1) 5 T. C. 263.

(2) *Nolder v. Walters* 15 T. C. 380.

(3) *Ricketts v. Colquhoun*, 10 T. C. 118; *Cook v. Koot* 2 T. C. 446.

(4) *Jones v. Comorthen* 10 O. L. J. Ex. 401.

(5) *Coville v. Commissioner*, I. T. Pb. 1936 Lab. 595; 9 I. T. C. 238; 1936 I. T. R. 187.

This privilege of living rent-free was valued, the amount of valuation not being disputed. On the assessee claiming exemption, in respect of this, under Section 5 (3) (vi) as being an allowance, benefit or perquisite specially granted to meet expenses wholly and necessarily incurred in the performance of duties of an officer, it was held, that the contract to provide rooms rent-free being a part of the contract of the manager's engagement, the case fell within Section* (7) (1) and that the exemption granted by the Act being merely in respect of the recoupment in cash or kind of expenses which the employee has actually been put to in the performance of his duties, the exemption claimed did not come within Section 4 (3) (vi) ⁶

(7) Income of a casual or non-recurring nature:—
In order to obtain exemption under this sub-section receipts must be of a casual and non-recurring nature. At times, however, even such receipts are not exempt.

Isolated transactions not exempt under this head:—

(1) Profits from brokerage of the sale of a mill, by a person formerly in the grain and cloth business (a).

(2) Profits from exchange business (b).

(3) Profits from sale of Government securities (c).

(4) Receipt by a cotton merchant of remuneration for winding up an estate (d).

(5) Compensation for loss of Managing Agency (e).

(6) *E. Abbot v. Commissioner I. T. B. & O.* 9 I. T. C. 9.

(a) *Chunnilal Kalyandas In re.* 1 I. T. C. 419 (421). 1925 All. 284.

(b) *Secretary, Board of Revenue, Mad. v. Arunachalam Chettiar* 1 I. T. C. 236 : 47 M. 107 : 1929 Mad. 28.

(c) *Amritsar Prudence Exch. In re.* 1937 I. T. 307 (328).

(d) *C. I. T. Bom. v. Sir Purshotamdas* 2 I. T. C. 8 : 1925 Bom. 813.

(e) *Turner Morrison & Co. v. C. I. T. Bengal* 8 I. T. C. 214, 1929 C. 212.

* Income-tax Act 1922.

(6) Money for sale of mining rights received by a Mining Engineer (f).

The principle was enunciated in an English case (by Lord Sankey J.) thus :—"though in most cases an isolated transaction does not fall to be chargeable, it was not possible to say that the mere fact that it was an isolated transaction at once takes it out of the category of chargeable profits" (g).

In an Indian case (Seth Ganga Sagar In re. (h) it was observed:—The question is one of fact.

It is the intention with which the purchase is made which makes the difference. A man may either buy shares or securities with the object and intention of making a gain from the sale when these shares or securities have arisen to a higher price, or he may purchase the shares or securities with the intention of keeping his capital safe and receiving meanwhile a certain amount of dividend or interest. The intention must be deduced from acts and from the circumstances of the case. Where a man makes a business of speculating this will be deduced by the Court from the fact that he makes numerous purchases and sales, the sales being within a short time of purchases. On the other hand where a man makes few sales, although he may make a number of purchases, and where the sales are made at long intervals after the purchases, the conclusion to be drawn is that he is not indulging in the business of speculating in these stocks and shares but that he is investing his capital in those stocks and shares. (i)

Gratuity paid out of a fund to an employee, by way of a generous and spontaneous action, and being a mere windfall, has been held to be exempt (j)

Where a profit is made out of a single transaction, the test to be applied in deciding whether it is capital assets or gain is to see whether if there was a gain made in an operation of business in carrying out a scheme for profits.

(f) Warick Small v. C. I. T. Bom. 5 I. T. C. 451.

(g) Beynon & Co. Ltd v. Ogg. 7 T. C. 135.

(h) 1984 I.T.R. 149 : I.T.C. 81 : 1984 All. 370.

(i) *Ibid.*

(j) Johnston v. C.I.T. Bur. 7 I.T.C. 399 1931 Rang. 876.

Agricultural income:—The following have been held to be so:—

- (1) Mutation fee paid by the tenant to the land-lord as such, upon succession to holding or tenure by inheritance, irrespective of the fact that the fee may be illegal or unenforceable¹;
- (2) *Salami* or *nazar* paid by a tenant to land-lord for his recognition as a tenant of a non-transferable holding²;
- (3) Income from pasturage and from fees realized from grazers³;
- (4) *Salami* paid for settlement of waste lands or abandoned holding⁴;
- (5) Income from toddy, when received by the actual cultivator, be he the owner or lessee of the land on which toddy is grown⁵;
- (6) Entire income from aloe plant including the manufacture of *Sisal* fibre⁶;
- (7) Annuity payable to a co-sharer under a deed by way of family settlement⁷;
- (8) Income from buildings required by the owner (receiver of rent or revenue) or occupier or receiver of rent in kind as a dwelling-house, store-house or out building (not being confined to any portion thereof), so long as the building is in

(1) *Raja Rajendar Narain Bhanja Dev v. Commissioner I.T.B. & O* 9 P.1: 1929 Pat 449, 4 I.T.C. 15.

(2) *Maharajadhiraj Darbhanga v. Commissioner I. T. B. & O.* 3 I.T.C. 158, 7 P. 550: 1928 Pat. 468; *Nawabzadi Mehra Banu*. 58 C. 841: 2 I.T.C. 99. 1925 Cal. 929.

(3) *Prabhat Chandra Barua*. 1 I.T.C. 284, 51 C. 504.

(4) *Birindra Kishore v. Secretary of State*. 48 C. 766: 25 C.W.N. 80 I. T.C. 67.

(5) *Yagappa Nadar* 50 M. 928: 1927 Mad. 1029: 2 I.T.C. 470.

(6) *J. M. Cassey v. Commissioner I.T. B. & O.* 9 P. 185: 1930 Pat 44 4 I.T.C. 259.

(7) *Gopalsaran Narainsingh v. Commissioner I. T.B. & O.* 7 I.T.C. 257; 1934 I.T. 294; IP. 661.

the vicinity of such lands and is required by reason of assessee's connection with the land⁸ ;

(9) *Dharat* or weighing charges levied by a land-lord from tenant⁹ ;

(10) Income from growing of tea¹⁰ ;

(11) Income from growing sugar up to the process of making *rab* from sugarcane¹¹ ;

(12) Income from forest¹².

It has been a moot point whether 'agriculture' includes 'forestry' in India. It was proposed to tax 'forestry' as not being agricultural income in the Bill of 1922 but the proposal was dropped on the opposition and the throwing out of the proposal by the Select Committee. The decision in *Zamindar of Singampatti's* case is, more or less, an *obiter*. The stacking, felling or marketing of timber, at any rate, is not agriculture ^{12*}

Note, also in this connection, that if a land-owner grows on his own land which is assessed to land revenue forests or trees and derives income therefrom, he is not liable to income-tax on such income. Persons, however, who take contracts in forests for the cutting down and selling of timber are liable to tax on the profits from such transactions.^{12-b}

Income from dairy, or sale of milk. The same may, however, be or not be agricultural income, according to the facts and circumstances of the case. It may not be agricultural income, if the cattle are wholly stall-fed and not pastured upon.

(8) *Raja Rajendra Narain Bhanja Deo v. Commissioner I.T.B. & O.* 4 I.T.C. 15, *Maharajadhiraj of Darbhanga*. 3 I.T.C. 158.

(9) *Probynabad Stud Farm*, 1936, Lah. 602: 1936 I.T.R. 114.

(10) *Keeling Valley Tea Co. v. Commissioner I.T. Bengal*, 48 C. 164 1 I.T.C. 54.

(11) *Bhikam Sugar Concern, in re*, 1 I. T. C. 129.

(12) *Commissioner I. Tax v. Zamindar. Singampatti*, 1 I.T.C. 184.

(12-a) *Har Prashad v. Emp.* 1 I. T. C. 417, *Emperor v. Prabhat Ch. Barua* 1 I. T. C. 284. *Manavedan Tirumalped v. Commissioner I. T. M.* 4 I. T. C. 421.

(12-b) Para 2 (iii) I. T. Manual.

If, however, they are fed mostly on pasturage, the income is agricultural. The question is one of fact. ^{12-c}. [See also under Section 66 and Section 4 (3) (viii), *infra*].

(13) Interest on arrears of rent of land used for agricultural purposes being part of rent derived from land, is not liable to tax, unless secured by a bond;¹³

(14) Income from property taken in possession under a *Zari Peshgi* and *thicca* lease for loan advanced;¹⁴

(15) Income from usufructuary mortgage, when it represents rent;¹⁵ (The question of income from usufructuary mortgage has been a moot one. For this see note ⁵ *supra*)

(16) Surplus rent to be appropriated towards loan on mortgage;¹⁶

(17) Part of income from lease of lands received as owner of a share.¹⁷

“Agricultural Income”—(b) what is not :—The following have, *inter alia* been held not to be ‘agricultural income’ :—

(1) Income derived from supply of water for irrigation purposes;¹

(2) Maintenance allowance received from *Zamindari* property;²

(12-c) In re Commissioner I. T. Burma v. Kokine Dairy, Rangoon 1938 R. 260 (F.B). 1938 I. T. R. 502.

(13) Para 2 (v) I. T. Manual.

(14) Maharajadhiraj of Darbhanga v. Commissioner I. Tax. 7 I. T. C. 1 64, 13 P. 386; 1934 Pat. 178. 1934 I. T. R. 107.

(15) Ibrahim Rawther v. Commissioner I. T. Mad. 51 M. 435; 3 I. T. C. 33; Mukand Singh v. Commissioner I. T. 2 I. T. C. 495; 1928 All. 81; Hajee Mohd. Sadik Khovee Sahib v. Commissioner I. T. Mad. 8 I.T.C. 188; 1936 Mad. 144; 1935 I. T. R. I.

(16) Commissioner I. Tax v. Maharajadhiraj of Darbhanga, 62 I. A. 215, 14 P 628; 1935 Pat. 1728; I. T. C. 891.

(17) Conville v. Commissioner I. T. Punjab, 8 I. T. C. 399; 1985 Lah. 978; 1985 I. T. R. 404.

(1) Col. Malik Sir Umar Hayat Khan v. Commissioner I. T. Punjab, 2 I. T. C. 52.

(2) Zamindar of Tirwar 52 M. 827; 1929 M. 598; Sundrabai v. Commissioner I. T. Bombay 5 I. T. C. 493; Saltanat Begam. in re 1933 I. T. R. 379.

- (3) Profits from a *mela*;⁸
- (4) Income from stone quarries;⁴
- (5) Income from markets, mooring, fisheries and ferries;⁵
- (6) Income from rent when the Zamindar accepts a promissory note for it;⁶ (it becomes then a loan, which includes interest also).
- (7) Income from loans paid in cash and repayable in paddy at harvest season;⁷
- (8) Income from manufacture of salt;⁸
- (9) Income from letting land for stocking timber;⁹
- (10) Income from toddy in the hands of other than the owner or lessor of land in which toddy is grown;¹⁰
- (11) Income of a usufructuary mortgagee from mortgaged lands, where it represents interest and not rent;¹¹
- (12) Part of income from tea relating to its manufacture;¹²
- (13) Income from sugar factory appertaining to manufacture thereof;¹³
- (14) Money payable monthly under a zamindar's will to his daughters, even though realized under a decree against the executrix;¹⁴
- (15) *Salami* paid for grant of mining lease in a lump sum;¹⁵

(3) *Umed Rasul Anath Bandu*, 28 C. 637.

(4) *Sahib Lal Gangaram v. Commissioner I. T.* 50 A. 98: 1927 All. 708; 2 I. T. C. 425.

(5) *Prabhat Chandra v. Commissioner I. T. Bengal* 54 C. 861, 1927 Cal. 432, 2 I. T. C. 392 (F. B.) *Maharajadhiraj of Darbhanga v. Commissioner I. T. B. & O.* 3. P. 470: 1924 Pat. 474; 1 I.T.C. 308; V.T.S. *Sevinga Pandia Jhevaro* 1932 Mad. 757; 56 M. 251; 6 I.T.C. 255.

(6) *Raja Inugant Rajgopal* 55 M. 830, 1932 Mad. 496; 6 I.T.C. 63.

(7) *Haji Cassim*, 10 R. 77: 1932 Rang. 19; 6 I.T.C. 41.

(8) *Linga Reddi* 50 M. 763 1927 Mad. 848, 2 I.T.C. 363.

(9) *Har Parsad v. Emp.*, 1925 Lah. 488; 1 I.T.C. 417; *Emp. v. Prabhat Chand Barua*, 1 I.T.C. 281.

(10) *Yagappa Nadar*, 50 M. 923: 1927 Mad. 1038; 2 I.T.C. 470.

(11) *Rajniti Pershad Singh*, 9 P. 194: 1930 Pat. 82; 4 I.T.C. 264; *Maharaja of Darbhanga*, 7 I.T.C. 164; 1934 Pat. 178.

(12) *Keeling Valley Tea Co.*, 48 C. 161; 1 I.T.C. 45.

(13) *Bhikmapur Sugar Concern in re*: 1 I.T.C. 29.

(14) *Vellanki Lakshmi Narasimha Rao, v. Commissioner I. T.* Mad. 52 M. 637, 1929 Mad. 598, 8 I.T.C. 428.

(15) *Sri Raja Shiva Pd. Singh*, 4 P. 78, 1924 Pat. 679; 1 I.T.C. 384.

- (16) Uttarayan, (illegal *abwab*) ; 16
- (17) *Punyaha Nazar* paid by tenants at the beginning of agricultural year ; 17
- (18) Income from cotton ginning ; 18
- (19) Commission received by land-lord for taking tenants' produce on their behalf; 19
- (20) Interest on pro-note executed for arrears of rent ;
- (21) *Lambardari* fee ; 21
- (22) Maintenance allowance paid to a widow, even though forming charge on estate ; 22
- (23) Rent of site of flour mill ; 23
- (24) Income from land let out for brick-kiln ; 24
- (25) Income from royalty on coal (*obiter*); 25
- (26) Income from license to take out *kankar* (concrete); 26
- (27) Income from tea grown in Indian States (outside British India), 27
- (28) Annuity payable in instalment forming consideration of transfer of *Zamindari*; 28

- (16) *Birinder Kishore Manick v. Secretary of State*, 1 I. T. C. 67 : 43 C. 766.
- (17) *Prabhat Chander Barua v. Commissioner of I. T. Bengal*, 21 I. T. C. 392 (P. B.) : 54 C. 561, 1927 Cal. 492.
- (18) *Sheo Lal Ram Lal v. Commissioner I. T., C. P.*, 4 I. T. C. 375.
- (19) *H. T. Canville v. Commissioner I. T.*, 1936 I. T. R. 137 1336 Lah. 595.
- (20) *Commissioner of Income-Tax Mad. v. Zamindar of Kirlampudi*, 55 M. 830. 1932 Mad. 496.
- (21) *H. T. Conville v. Commissioner I. T. Punjab*, 1936 I. T. R. 137 1936 Lah. 595.
- (22) *Saltanat Begam In re*; 1933 I. T. R. 379 1933 Oudh 475.
- (23) *H. T. Conville v Commissioner I. T. Punjab*, 1936 I. T. R. 137 1936 Lah. 595.
- (24) *Maharani Janki Kaur v. Commissioner I. T. B. & O.*, 5 I. T. C. 42
- (25) *Maharani Janki Kaur v. Commissioner I. T. B. & O.*, 5 I. T. C. 42 (49).
- (26) *Ibid.*
- (27) *Mahanpura Tea Co. Ltd. In re*. 1937 I. T. R. 118.
- (28) *Gopalsaran Narain Singh v. Commissioner I. T.*, 7 I. T. C. 257, 1934 Pat. 385, 13 P. 661, 1931 I. T. R. 264. (*See also* 62 I. A. 20) 8 I. T. C. 340 1935 P. C. 113).

(29) Monthly allowance paid to a junior member of *taluqdari* Estate out of Estates' property as consideration for relinquishing claim against the estate; ²⁹

(30) Monthly allowance paid to a junior member of an impartible *raj*; ³⁰

'Rent' in case of usufructuary mortgage, though appropriated towards interest, is agriculturer* allowance paid to a junior member of an impartible *raj* was held not to be agricultural income (*obiter*) In *Lal Suresh Singh v. Commissioner I.T., U.P. and C.P.* (9.I.T.C.35: 1935 I.T.R.356) also allowance paid to a junior member of a *taluqdari* estate for giving up his claim to the said estate was held not to be agricultural income".

Income from tea grown in an Indian state was not an agricultural income.

5. This Act shall apply to every business of which any **Application of Act.** part of the profits made during the chargeable accounting period is chargeable to Income-tax by virtue of the provisions of sub-clause (i) or sub-clause (ii) of clause (b) of sub-section (1) of Section 4 of the Indian Income-tax Act, 1922, or of clause (c) of that sub-section :

Provided that this Act shall not apply to any business the whole of the profits of which accrue or arise without British India where such business is carried on by or on behalf of a person who is resident but not ordinarily resident in British India unless the business is controlled in India :

Provided further that where the profits of a part only of a business carried on by a person who is not resident in British India or not ordinarily so resident accrue or arise in British India or are deemed under the Indian Income-tax Act, 1922, so

(29) *Lal Suresh Singh v. Commissioner I. T., U. P. & C. P.* 9 I. T. C. 35: 1935 O. W. N. 1148: 1935 I. T. R. 356.

(30) *Vijayanand Ganpati Maharaj Kumar v. Commissioner I. T.,* 9 I. T. C. 7: 1934 All. 818: 1934 I. T. R. 186.

**Haji Mohd. Sadik v. C.I.T. Mad.* 8 I.T.C. 138 : 1936 *Mad.* 144

to accrue or arise, then, except where the business being the business of a person who is resident but not ordinarily resident in British India is controlled in India this Act shall apply only to such part of the business, and such part shall for all the purposes of this Act be deemed to be a separate business.

1. **Section 5. Previous Law :—**Section 3, Act X of 1919 contained corresponding provisions.

2. **Analogous Law :—**(a) *Indian Law* Section 4 Income Tax Act, 1923 (amended 1939).

(b) *English Law* :—Part III, Section 12 (2) contains similar provision, relating to the applicability of Excess Profits Tax provision to all trades or business of any description carried on in the United Kingdom.

3. **Scope of Section 5 :—**Section 5 indicates the applicability of the Act. The Section renders liable to Excess Profits Tax 'every business'. The words 'every business' are qualified by the following expression, 'of which any part of the profits1922. Looking to the provisions of sub-clause (i) and sub-clause (ii) of clause (b) of sub-section (1) of Section 4, Income tax Act, 1922,* it is clear that the profits must be the profits of a person resident in British India during the chargeable accounting period and must have accrued or arisen or must be deemed to have accrued or arisen to such person during such period, or might have accrued or arisen to him without British India during such period.

Where such person was not residing in British India during the chargeable accounting period, if profits have accrued or arisen to him in British India, during such period, they would be liable to be assessed to Excess Profits Tax. To sum up profits, (exceeding standard profits), being excess profits arising from every business whatever, carried on by a person residing in British India during the chargeable accounting period, whether accruing or arising to him in British India or without it shall be liable to Excess Profits Tax, and, irrespective of his having been residing in British India, during the chargeable

* See Section 4 Income-tax Act in Part III of this book.

accounting period, such profits shall also be so liable, if they have accrued or arisen in British India during such (*i.e.* chargeable accounting) period.

To sum up, (*in the words of Mr. J. F. Sheehy as put in the Council of State*) "in the case of persons ordinarily resident, the whole of their business profits wherever they arise will be liable. In the case of persons resident but not ordinarily resident, profits arising outside British India and not deemed to arise in British India will not be liable unless the business is controlled in British India. And in the case of non-residents, only profits arising or deemed to arise in British India will be taxable. In all cases the tax is leviable on the arising basis and not on the remittance basis, so that if a resident or a non-resident receives in British India foreign profits which are not taxable on the arising basis they will not be liable to the excess profits tax although they will be liable to income tax.'

The two succeeding provisos qualify the general applicability of the provisions of the Excess Profits Tax Act to the profits of every business carried on by a person residing in British India or to those that might have accrued or arisen to him in British India, even if he was not residing there in the chargeable accounting period.

By introducing the above provision of Income-tax law here the principle of ignoring the *person* and only taking into account *the place* where income accrues, arises or is received has been made applicable here also, as under the Income-tax Act, 1922.¹

Of course, just as in the United Kingdom, so in India, two or more businesses carried on by one and the same person are to be treated as one, [*vide* Section 2 (5) of the Act, *ante* and Part III Section 12 (5) Finance Act, 2 of 1939.]

In order to determine the profits assessable to Excess Profits Tax, the definition of 'business' as given in Section 2 (5) *ante* shall have always to be kept in view.

For instance, profits of a profession will not be liable to Excess Profits Tax as 'profession' is excluded from the term

¹ Rogers Pyatt Shellac & Co., v. Secretary of State for India 1 L. T. C. 968 (572).

business. Again, as the holding of investments by an incorporated Society is business, according to proviso 2 of Section 2 (5), a Bank or an Insurance Company is liable to Excess Profits Tax on its profits from investments. In the original Bill as presented to the Assembly, therefore, there was no exemption as to the profits of the Life Insurance Companies in India as is contained in the Proviso to Section 4.

It may, in this connection, be stated that great exception was taken to the applicability of the provision of the Excess Profits Tax Act in India to Insurance Companies on the ground that they were not doing investment business and were not holding investments. The *premia* that they obtained from their policy holders was not, it was stated, their profit but the deposit of policy-holders, which they had to repay to the latter (in a capitalized, accumulated form) at the end of a particular period or after a particular event. Then, it was said, the companies had made no particular profits out of the war. The Select Committee, accordingly, exempted profits from Life Insurance business from the liability to E. P. Tax.

Excess Profits Duty is leviable on Insurance Companies in United Kingdom according to the provisions in the Finance Act, 1939.

Looking to Section 5, as a whole, it would appear that it lays down two tests for the profits of a business in order that the same might be hit by the Act. These tests are :—

(1) the profits of the business should be liable to pay income-tax (main section).

(2) Accrual, in whole or in part, of the profits in British India. (Provisos).

In view of the amendments made in Section 4, Income-tax Act, 1922 by the 1939 Amendment Act, liability to pay income-tax brings in the question of residence, non-residence and 'not ordinarily resident' to the fore-front.

We take these *seriatim*, below

(a) **Residents** :—The case of 'residents' is very simple. In their case, their liability to pay Excess Profits Tax exists in

respect of the profits of every business, any part of the profits whereof made during the chargeable accounting period accrue, or arise, (or are deemed to accrue or arise) in British India, or whether such part of profits accrues or arises without British India.

(b) **Non-residents** :—In the case of non-resident such part of the profits as accrue or arise in British India or is deemed so to accrue or arise (and which is to be deemed to be a separate business) shall be affected by the provisions of the Act.

(c) In the case of persons not ordinarily resident, the Act shall apply if the whole of the income accrues or arises in British India. It will be so even if the whole income arises or accrues outside British India, but the business is controlled in British India.

On the same principle, if a part only of the income arises or accrues in British India, only such part shall be amenable to the provisions of the Act, and it shall be treated as a 'separate business'.

If, however, the control of business is in India, the whole of the business shall be amenable to the provisos of the Act and shall be subject to Excess Profits Tax on its profits if part only of the income arises in British India.

Foreign profits shall not be subject to Excess Profits Tax under the Act in the case of non-residents at all. Profits arising or accruing in British India are in all cases available to Excess Profits Tax irrespective of residence, non-residence or of a person being not ordinarily resident in British India.

It is notable that profits from abroad made before the chargeable accounting period are not chargeable to Excess Profits Tax on the basis of being brought into British India. In this respect, the scope of Excess Profits Tax is not so wide as that of Income Tax.

An amendment was moved in the Assembly to the effect that profits of business accruing or arising without British India shall be totally exempt from Excess Profits Tax, but it was negatived. In connection with the discussion on this motion it was observed :—

"Now, first of all, I would like to point out that Indians

outside British India are not liable to Excess Profits Tax. That is the first point. Let us make quite sure that we understand what we are talking about. Indians trading outside India, who are not resident in India, are not liable to Excess Profits Tax. I will go a step further. There are some who, although they trade outside India, come back to this country and under the definition of 'residence' in the Income-tax Act, are residents in India and are, therefore, liable to Indian Income-tax, although most of them will be not ordinarily resident in British India. In fact, an amendment in Section 4 of the Indian Income-tax Act was specially designed to exclude from a certain basis, the so called residence basis, Indians who were trading abroad and who came back to this country and who would be caught by the normal definition of residence. It was, therefore, provided that such persons, though residents, should not pay income-tax on the basis of the amounts arising abroad but only on the amounts brought into British India. That disposed, for the main part, of a number of difficulties with regard to exchange on the income-tax side. When we come to the excess profits tax, if Honourable Members, have looked carefully at clause 5, they will have seen that the scope of the excess profits tax is not so wide as the scope of the income-tax. All profits which are assessable on the basis of the amount brought into British India are excluded from the scope of the excess profits tax." (*Mr. S. P. Chamber*). The above observation throws a flood of light on the scope of the liability to Excess Profits Tax, which is the subject of Section 5.

4. Shall apply to every business:—The words used in the corresponding English Act Section 12 (2) [Finance Act (2) of 1939] are:—"The trades and businesses to which this Section applies". The word 'trade' (according to Section 237 English Income Tax Act, 1918) includes every trade, manufacture, adventure or concern in the nature of trade". This, it has been observed, is not an accurate or exhaustive definition of the term. The word 'business' has also been observed to be 'vague', the construing of which has been said to be difficult. ¹

1. *Commissioner Inland Revenue v. Sangster* 12 T.C. 208 (219)

The expression 'trade or 'business' has been observed to be more comprehensive than 'trade' for there may be businesses which are not 'trades' 2.

The word 'business' used in the Indian Act is thus, wider and may include 'profession'. See notes under 'Business' Section 2 (5) *ante*.

5. Made during the chargeable accounting period:- These words were added by the Select Committee for the purpose of clearing up a rather vague point. They observe: — "Where a person carried on two businesses during the standard periods and discontinued one of them before the chargeable accounting period, it is necessary to secure that the profits, loss and capital of the discontinued business should be left out of account in determining the standard profits. While it is arguable that a business which has been discontinued before the chargeable accounting period is not a business to which the Act applies, we have considered it desirable to clarify this point by the insertion of the words during the chargeable accounting period".

6. Chargeable to Income-tax:—Under the United Kingdom law also, profits for Excess Profits Tax purposes are to be computed on income-tax principles. The profits available to Excess Profits Tax are of the nature of 'annual profits or gains', which are the subject of Income-tax.

7. Proviso 1. The provisions of this proviso qualify or limit the profits of a business, accruing or arising without British India. They are analogous to the provisions contained in Proviso 2 to Section 4 (1) (c) Indian Income Tax Act 1922 (Amended 1939) which is as under:—

Provided further that, in the case of a person not ordinarily resident in British India, income, profits and gains which accrue or arise to him without British India shall not be so included unless they are derived from a business, controlled in or a profession or vocation set up in India or unless they are brought into or received in British India by him during such year.

2. *Rolls v. Miller* 8 Ch. D. 71 (85); *C.I.R. v Incorporated Council of Law Reporting* 3 T. C. 105 (118) (a corporation Duty Case).

According to this proviso, the test of liability to tax of the profits of a business carried by or on behalf of a person not ordinarily resident in British India, where the profits accrue or arise without British India, is that the business be controlled in India.

8. Not ordinarily resident in British India:—This expression shall have the same meaning in this Act as are assigned to it under Section 4-B Income Tax Act (1922).

Under the United Kingdom law, Excess Profits Tax is chargeable on profits of business carried on by persons 'ordinarily resident in the United Kingdom,' whether the business is carried on personally by such person or through an agent is immaterial.

In an English case, *Levene v. Commissioner Inland Revenue*¹, assessee, a British, subject, spent some 4 or 5 months in United Kingdom and the rest of the year he resided abroad. He was held to be 'ordinarily resident' in United Kingdom. In this case *Lord Cave* observed:—

"The expression 'ordinary residence' is contrasted in the Income-tax Act "with usual or occasional or temporary residence; and I think it connotes residence in a place with some degree of continuity, and apart from accidental or temporary absences. So understood, the expression differs little in meaning from the word 'residence' as used in the Acts; and I find it difficult to imagine case in which a man, while not resident here, is yet ordinarily resident here."

In another English case, *Lysaght v. Commissioner Inland Revenue*² a person (living in Ireland) coming to England every month for, say, a week or so to attend to business was held to be 'ordinarily resident' in United Kingdom.

Lord Sumner observed:—"I think that the converse to 'ordinarily' is 'extraordinarily' and that part of the regular order of a man's life adopted voluntarily and for settled purposes, is not 'extraordinarily.' Having regard to the time and

1. (1928) 18 T.C. 496

2. (1928) 14 T.C. 511

duration, the objects and obligations of Mr. Lysaght's visits to England, there was in my opinion evidence to support, and no rule of law to prevent, a finding that he was ordinarily resident, if he was resident in the United Kingdom at all".

9. Business is controlled :—As to the term 'control', the *Enquiry Committee*, in using this word in their recommendations as to the amendments to be made to Section 4, (I. T. Act) observed:—"As to what constitutes 'control' there is, we consider, sufficient guidance in the numerous decided cases."

The one great principle as to control, as laid down in the so many judicial decisions, both in India and in England, is that it is after all a question of fact in each case.

In an English case, *The Egyptian Hotels Ltd. v. Mitchell*,¹ the following considerations were held to determine the controlling power of the company.

(1) The company was an English company, having its registered office in England.

(2) the whole of the control of the share capital of the company was left with the Directors.

(3) The question of increase and reduction of the company's capital was left to the Directors.

(4) The business to be dealt with at an ordinary meeting included the consideration of the profit and loss account, the balance sheet, the report of directors and auditors and the declaration of dividend.

(5) the remuneration of the members of the local Boards in Egypt remained with the directors who were also, when deemed expedient, to ascertain the profits of the Egyptian business.

The above facts were held to be considerations constituting sufficient evidence that the controlling power rested in England.

1. 26 T. C. 152 (161,162)

In the same case, it was pointed out (in appeal, by the Court of Appeal) :—(*Per Cozens Hardy, M. R.*) "The company at one time admittedly were carrying on a business in London, not because the hotels, which are their only assets, were in the United Kingdom, for they were in Egypt, but because the control of the company was in the hands of the London Board of Directors. The brain and management and control was there, and the authorities plainly settled that if you find that, it does not in the least matter where the actual selling of the goods and buying of the goods takes place. Many an English company, with offices in London, with a Board of Directors in London, carries on a business in a remote part of the world, nevertheless it has its trade carried on in London, because the management and brain of the undertaking are at the head office in London. In the House of Lords, in this very case, it was pointed out (*Per Earl Lorburn*) that "it is not what they (the directors have power to do but what they have actually done, which is of importance for determining the question" of control. ¹

In *Colquhoun v. Brooks* ² the very same principle was enunciated that the important point was not whether the person charged and held assessable had power to interfere with the trade or business but whether he had in fact interfered during the period for which the Crown holds him to be assessable.

In another English case, it was held by the House of Lords that a trade or business cannot be said to be wholly carried on abroad if it be under the control and management of persons resident in the United Kingdom, although such persons act wholly through agents, and managers resident abroad.

In *Ogilvie v. Kitton* ⁴ Thomas Ogilvie was "by himself the sole trader carrying on business... and vested with the sole right to manage and control every department of its affairs, and alone entitled to the profits and liable in the losses of and in connection with the said business". It was said that,

1. *The Egyptian Hotel Ltd.* 5 T.C. 547 (550)

2. 2 T.C. 490

3. *The San Paulo (Brazilian) Railway Co. Ltd. v. Carter* 8 T.C. 407: (1896) A.C. 31.

4. 5 T.C. 385.

although all this may be true, although Mr. Thomas Ogilvie, senior, may have in theory the absolute control of the business or trade.....since it is carried on for his sole benefityet not a single instance has ever occurred in which he has, as a matter of fact, attempted to exercise his control, or to give directions even as to the smallest details. Yet the right of control is there all the time and might be exercised at any moment.....He cannotescape from liability.

The question of control has been closely connected with the question of carrying on of trade or business and residence.

In *De Beers Consolidated Mines, Ltd. v. Howe*¹ it was observed (*per Lord Chancellor*): "An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England, under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of *Chief Baron Kelly and Baron Cesena Sulphur Company v. Nicholson* and the *Cesena Sulphur Company v. Nicholson*, now thirty years ago, involved the principle that a company resides, for purposes of Income-tax, where its real business is carried on."

It was held that the real business is carried on where the central management and control actually abides.

10. Proviso 2:—This proviso relates to the assessability to Excess Profits Tax of a part only of the profits of the business of a foreigner accruing or deemed to accrue or arising in British India, where the business is controlled in India.

Such a part shall be deemed to be 'separate business' for the purposes of Excess Profits Tax. See also notes under 'Scope of Section 5' *ante*.

11. Where the profits of a part only of a business:— These words as they stand at present were amended (at a motion •

1. 5. T. C. 198 (213)

by Mr. S. P. Chambers in the Assembly). The amendment was really a verbal amendment which makes it clear that "we are referring to the profit of a part of a business and not to a part of the profits of a business. This is merely a matter of clarification."

6. (1) For the purposes of this Act, the standard profits ~~of a business in relation to any chargeable accounting period~~ ^{standard profits.} shall, subject to the provisions of sub-sections (3) and (4), be an amount bearing to the profits of that business during the standard period, if in respect of that business a standard period is available, the same proportion as the chargeable accounting period bears to the standard period :

Provided that if the average amount of capital employed in the business during such chargeable accounting period is greater or less than the average amount of capital employed during the standard period, such amount shall be increased or decreased, as the case may be, by an amount calculated by applying the statutory percentage to the amount of such increase or decrease :

Provided further that in the case of a business which was commenced on or after the 31st day of March, 1936, the standard profits shall, at the option of the person carrying on the business, be an amount calculated by applying the statutory percentage to the average amount of capital employed in the business during such chargeable accounting period.

(2) For the purposes of this Section the standard period shall, at the option of the person carrying on the business, be:—

- (a) the 'previous year' as determined under Section 2 of the Indian Income-tax Act, 1922, for the purpose of the Income-tax assessment for the year ending on the 31st day of March, 1937, or the previous year as so determined for the year ending on the 31st day of March, 1938 ; or
- (b) the 'previous year' as so determined for the year ending on the 31st day of March, 1937, and that for the year ending on the 31st day of March, 1939 ; or

(c) the "previous year" as so determined for the year ending on the 31st day of March, 1938, and that for the year ending on the 31st day of March, 1939 ; or

(d) the "previous year" as so determined for the year ending on the 31st day of March, 1939, and that for the year ending on the 31st day of March, 1940 :

Provided that in no case shall any period of less than nine months be taken as a standard period.

(3) *If, within the period specified in the notice issued under sub-section (1) of Section 13, the person carrying on the business makes an application to the Excess Profits Tax Officer in this behalf, the Excess Profits Tax Officer shall refer the application to the Board of Referees, and if the Board is satisfied that during the standard period the profits of the business were less than might at the beginning of that period have been reasonably expected, it may direct that the standard profits shall be computed as if the profits during the standard period were such greater amount as it thinks just :—*

Provided that such amount shall not exceed the statutory percentage of the average amount of the capital employed in the business unless the Board is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed.

(4) *The standard profits shall be taken to be rupees thirty-six thousand in any case in which the standard profits computed in accordance with sub-section (1) are less than this sum :*

Provided that if the chargeable accounting period is greater or less than one year the sum of rupees thirty-six thousand shall for the purpose of this sub-section be increased or decreased proportionately.

(5) *Where the standard period includes any period prior to the commencement of Part III of the Government of India Act, 1935, during which Burma was part of British India, there shall, in computing the standard profits of a business*

under this Section, be excluded from the profits of the business during the standard period so much of such profits as arose or accrued or were received in Burma unless such profits are also included in the profits of the business during the chargeable accounting period.

1 Previous Law :—Section 6, Excess Profits Duty, Act, 1919.

2 Analogous Law :—Section 13, Finance Act, 2 of 1939.

It is notable that, although Section 13 Finance Act, 2 of 1939, contains provisions similar to those contained in Section 6 of the Indian Act, there are minor differences of detail. For instance, while there is a minimum standard fixed both under the English and the Indian law, under the former law (Section 13 (1), Part III Finance Act, 1939,) if the tax payer so elects, the standard profits of his business shall be taken to be the minimum amount specified in Section 13 (2) which is £1,000, the largest sum which can be the minimum being £ 3,000 (in case of partnership and of companies). In the absence of an election as above-mentioned, the standard profits are to be computed with reference to sub-section (3) to (9) of the Section *i.e.* (Section 13).

3 Scope of Section 6 :—Section 6 lays down how "standard profits" are to be determined. What are "standard profits"? Why should the same be determined? These are the rudimentary, yet important questions relating to the assessment to Excess Profits Tax. Under the Act (*i.e.* the Excess Profits Tax Act) excess profits are to be taxed. For this, one has to find out what are excess profits. In order to determine these, one has to compare the profits of the 'chargeable accounting period' with some other profits. These latter are standard profits. The legislation has laid down a certain standard of profits, with reference to which the excess profits liable to tax is to be determined. It is only when there is an Excess that the liability to tax arises. This excess has to be found out and for the purpose you must compare the profits in question with what are technically and rightly termed as standard profits. That

standard when found out will enable one to find out the excess. Any profits in excess of, *i.e.* over and above, these standard profits are assessable to Excess Profits Tax. Section 6 lays down how to find out these standard profits. Hence, the value and importance of determining standard profits.

Be it stated at the outset that, both under the English and the Indian law, the ascertainment of "standard profits" is not a fixed proceeding. It is, on the other hand, a varying proceeding, for the simple reason that standard profits may be determined either with reference to a standard period, (if any is available) which is to be determined as laid down in Section 6 (2) (a) to (d), or they may be determined by applying the statutory percentage [Second proviso to Section 6 (1).] Standard profits may be either increased or decreased in terms of the first proviso to sub-section (1), Section 6.

Again, standard profits may be those adjusted by the Board of Referees under Section 6 (3). Standard profits are thus naturally varying. They may be determined either (a) with reference to the profits of the standard period, or (b) with reference to statutory percentage or (c) may be adjusted by the Board of Referees. Section 6 (2) deals with the "standard period", proviso 2 to Section 6 with statutory percentage and Section 6 (3) with adjustment by the Board of Referees.

Of course, if the profits fall short of the minimum as laid down in Section 6 (4) *i.e.* Rs. 36,000 per annum, no question of liability to Excess Profits Tax arises.

According to the proviso to Section 6 (4) the minimum sum of Rs. 36,000 may be increased or decreased according as the chargeable accounting period is less than one year.

For 'standard period' see notes under Section 6 (2) *post*.

4. Subject to the provisions of sub-section (3) & (4) Sub-section (3) relates to a reference to the Board of Referees, on the application by an assessee for determination of standard profits and the raising of the amount thereof. Sub-section (4) lays down the minimum amount of standard profits.*

5. An amount bearing.....standard period:—

This is the method of determination of standard profits with reference to the period selected, *i.e.* the standard period, as given in sub-section (2) of this Section. Supposing the chargeable accounting period is half the standard period and the profits during the said period amount to Rs. 10,000 then the standard profits would be Rs. 5,000, and any profits over and above that would be excess profits liable to Excess Profits Tax. Under the English law, the standard profits vary in the proportion of the chargeable accounting period *vide* Proviso to Section 13 (1) Part III, Finance Act 2 of 1939 on the point.

6. Standard period:—The 'standard period' has, for the purpose of computing the 'standard profits', to be selected, at the option of the person carrying on the business, in terms of Section 6, sub-section (2). See below under Section 6 (2).

7. If in respect of that business a standard period is available:—These words were added by the Select Committee to make the applicability of standard profits clear. The provisions of Section 6 (1) are applicable only if in respect of the business a standard period is available. In the case provided for in proviso 2, below, statutory percentage will be applied to determine excess profits if there is no standard period available. There are cases where, in relation to a business, standard period (in terms of 6) (2) may be available and there may also be cases where no such period may be available.

To take concrete instance, if a business has commenced, say on 1-5-1939, its age of existence has been only eleven months. No standard period is available in respect of such business under Section 6 (2). In such a case, statutory percentage will apply. If, on the other hand, a business takes its start, say from 1st March, 1937, standard period is available in respect of the same and so the case will be governed by the provisions of Section 6 (1). The following examples illustrates the case covered by Section 6 (1):—

	Ra.
(a) Suppose profits of chargeable accounting	
• period ending 31.3.1940....	... 96,000

Profit of the standard period accounting year
1935-36 (Assessment year 1936-37 [elected under
Section 6(2) (a)] ... 48,000

Average capital employed being the same

Excess Profits for 12 months ... 48,000

Excess profits for 7 months from 1-9-39
to 31-3-1940 ... 28,000

Tax @ 50% of the excess profits ... 14,000

(b) Suppose profits of chargeable accounting
period ending 31-3-1940 ... 96,000

Profits of the standard period, accounting year
1935-36, Assessment year 1936-37 ... 30,000

Profits of the standard period accounting
year 1937-38 (Assessment year 1938-39) ... 24,000
54,000

[elected under Section 6(2) (b)] profits of 24
months ... 54,000

Average profit (standard) for 12 months 27,000

[*But according to the provision Section 6 (4)
the standard profits will be taken as ... 36,000

Therefore excess profits of 12 months (96,000-36,000) = 60,000

Excess profits for 7 months (1.9 33
to 31.3 40.) ... 35,000

Tax at 50% of the excess profits ... 17,500

8. Proviso 1:—This proviso is substantially the same as the proviso to Section 13 (3) (United Kingdom). Finance Act (2) of 1939. The proviso requires allowances to be made for increase or decrease in the capital employed in the trade or business in the chargeable accounting period as compared with that employed in the standard period. *Standard profits will, therefore, increase or decrease in proportion to the increase or decrease in the average amount of capital employed in the business in the chargeable accounting period. And the amount of such an increase or decrease shall be determined by applying the statutory percentage. The provisions are well illustrated by the following examples :—

Rs.

(1) (Variation under Proviso 1 Section 6.—In case of increase of capital employed in the business Suppose profits of the chargeable accounting period ending 31.3. 1940 (Assessment year 1940-41) ... 100,000

Profits of the standard period accounting year 1935-36. (Assessment year 1936-37) ... 48,000

Increase in amount of capital in the two years ... 40,000

Profits of the chargeable accounting period after being reduced by 10% of 40,000 i.e. 4,000 96,000

Excess profits for the 12 months (96,000—48,000) 48,000

Excess profits for the 7 months ... 28,000

Tax at 50% of the Excess Profits ... 14,000

(2) Variation under proviso I in case of decrease in capital employed in business.

Suppose profits of the chargeable accounting period ending 31.3.40. (Assessment year 1940-41) ... 93,000

Profits of the standard period, accounting year 1935-36 (Assessment year 1936-37) ... 48,000

Decrease in the amount of capital in the two years. 50,000

Profits of the chargeable accounting period after being increased by 6% of 50,000 i.e. 3,000 96,000

Excess profits for the 12 months (96,000—48,000). 48,000

Excess profits for the 7 months ... 28,000

Tax at 50% of the excess profits ... 14,000

9. Proviso 2:—This proviso was amended by the Select Committee "our amendment of sub-clause (1) is intended to provide that a business started after the 31st day of March, 1936 may at its option take as the standard profits either the profits of a standard period, where it has been in existence long enough to have a standard period, or the statutory percentage or the capital employed in the business".

The provisions of this proviso are applicable only where the business, the profits of which are in question, commenced on or after the 31st March, 1936.

The question of commencement of business, being intimately connected with the existence of a business is a matter of cardinal importance, as this will decide whether profits standard, as distinct from percentage standard, is applicable and if profits standard is applicable, which is the period selected as standard period out of those mentioned in Section 6 (2) *post*. This is the case under the English law also.

In an English case, *The Birmingham and Dt. Cattle By-Products Co. Ltd. v. Commissioner Inland Revenue*, assessee company was incorporated on 20th June, 1913. Between this date and 6th October, 1913 the company was busy in fixing the preliminaries only, e.g. erection of works and purchase of plant and machinery. It was on 6th October, 1913 that the Company started receiving raw materials for purpose of manufacture. Its audited accounts submitted were for the period 6th October, 1913 to 31st December, 1914. It was held that the company commenced business not on the date of incorporation i.e. 20th June, 1914 but on 6th October, 1913. The basis of statutory percentage on the average amount of capital during the accounting period was employed.

The principle of the above ruling is that the date of commencement of business of a company is not the date of its inception or incorporation but that of its actually starting business, for the purposes of the determining standard profits.

The same principle should apply to Indian cases also.

The question of the date of commencement of business of company is, after all, one of fact. It was so held in the English case, *Cannop Coal Co., Ltd. v. Commissioner Inland Revenue*.^(1-a) In this case, also, the question of commencement of business gained importance with reference to the determination of standard profits. Assessee was a coal mining company, incorporated in 1906. It was not till April, 1912, that its pits were on revenue basis. The accounts of the company were made up and audited half yearly to 30th June and 31st December and on the assumption that it had three pre-war trade years which ended

1. 12 T. C. 92.

1-a 12 T. C. 81 (89-41).

on 30th June, 1914, two years ending 30th June, 1912 and 30th June, 1914 being the most favourable years of the company, were selected for the purposes of computing average profits. It was held that the company had three pre-war years and that the computation was correct.

Where there is a transfer of business, a new business is supposed to have been set up and in such a case a pre-war standard of profits based on the profits of the original business cannot be taken for the purposes of Excess Profits Duty computation.^{1-b}

In this case, a millinery business, carried on for over 40 years, was transferred. Transferees did not take over any stock or books or book debts or contracts or liabilities; nor was there any agreement as to good will or to the making of any payment therefor. The original proprietor simply handed over to some of her sales-women their order books. The name of the business "Emelie" was also not adopted with her consent. It was held in the case that there was no succession and a new business was set up on transfer.

Statutory percentage on capital employed in the business was applied in the case and was held to be correct.

In connection with the question of computation of standard profits, a question at times arise requiring a determination as to whether a particular sum is or is not profits. Such questions have arisen under the English law. In the case *The Glenboig Union Firelay Co. Ltd. v. The Commissioner Inland Revenue*² the company, a fire-clay goods manufacturing company, received compensation for leaving part of the fire-clay unworked and damages for wrongful interdict obtained against it. The House of Lords held that the compensation so received from the sterilization of capital asset was not a profit. As to damages, the majority of the Lords in the Court of Sessions (Edinburgh) held that the damages received for wrongful interdict were not

^{1-b} *Mills Fram Emelie Ltd. v. The Commissioner Inland Revenue* 12 T. C. 78 (77, 81).

(²) 12 T. C. 427, 456, 461, 464, 466).

profits but merely the equivalent of expenditure incurred in protecting capital asset.

The following have, under the English law, been held to be *profits from trade or business*.

- (a) Addition to reserve fund out of profits ; ⁴
- (b) Profits from acquiring concessions and turning them to account ; ⁵
- (c) Profits of a retiring proprietor, made in the course of the realization of trading stock ; ⁶
- (d) Profits of Executor on completion of contract entered into by deceased ; ⁷
- (e) Compensation awarded in respect of loss or damage, due to an act under the Defence of Realm Regulations, under the Indemnity Act ; ⁸
- (f) Compensation for cancellation of contract. ⁹
- (g) Profits arising out of fooding arrangement. ¹⁰
- (h) Compensation received by Shipowners, for compulsory detention of ships by Government. ¹¹
- (i) Agreed payment and settlement of claim for breach of contract. ¹²
- (j) Compensation paid by Government for carrying on trade under restraint (*i. e.* under control of Food Controller). ¹³

4. Irish Catholic Church Property Insurance Co., Ltd. v. Commissioners Inland Revenue 12 T. C. 13 (20, 21)

5. Commissioner of Inland Revenue v. The Korean Syndicate, 12 T. C. 181=(1920) 1 K. B. 598=(1921) 8 K. B. 258.

6. J. & R. O'Kane v Commissioner Inland Revenue 12 T. C. 303

7. Cohan's Executors v. The Commissioner Inland Revenue 12 T. C. 602

8. Commissioner Inland Revenue v New Castle Brassworks 12 T. C. 927

9. The Sunderland Ship-building Co v The Commissioner Inland Revenue. 12 T. C. 955 Commissioner Inland Revenue v. The Northfleet Coal & Ballast Co. 12 T. C. 1102

10 Lambert Bros v. Commissioner Inland Revenue 12 T. C. 1053

11. Jesse Robinson & Sons v. Commissioner Inland Revenue 12 T. C. 1241

12. Ensign Shipping Co. Ltd. v. The Commissioner Inland Revenue 12 T. C. 1169

13. Charles Bros & Co. v. Commissioner Inland Revenue 12 T. C. 256

10. Statutory percentage:—This percentage is to be eight per cent in the case of business carried on by companies (or bodies corporate) and ten per cent in relation to any other business, the percentage in the case of any decrease of capital being six.

The above rates will be found stated in the definition of the term 'statutory percentage' as given in Section 2 (22) (a) and (b) and proviso *ante*.

These rates have been taken bodily from the English law, *vide* Section 13 (9) (a) (b) Part III, Finance Act, 1939.

In the case of companies, the above percentage of eight per cent will not apply to companies, the directors whereof have a controlling interest in the company. [Section (22) (a)] In an English case, "*Glasgow Expanded Metal Co., Ltd. v. Commissioner Inland Revenue*"¹⁴ the directors of the company held 4,300 out of a total of 7,600 shares issued, each share carrying one vote. The remuneration of the directors was, under the Articles of the company, to be fixed in a general meeting of the company. Some of the directors were employees of the company holding positions in respect of which the managing directors had the power to fix the remuneration.

The company contended that the directors did not have a controlling interest. It was held that the directors had a controlling interest.

It was pointed out (*per Lord Clyde, President*) that the only interpretation which can be given to the expression 'controlling interest' is by reference to the power which the number of shares held by the directors gives them to control the disposal of the company's assets and the administration of its affairs at a general meeting of the company. It was, further, observed that if that be the true interpretation of those words, then there is no doubt that in the case of the present company the seven directors did have a controlling interest within the meaning of the Section, because they held among them shares enough to enable them (if they were minded to act together) to

14. 12 T. C. 578 (578,579,580)

turn the decision of any general meeting of the company. It is nothing to the point that three of the directors were also employees."

(*Per Lord Cullen*) The shareholding directors are such as to give them a preponderating vote on any question that comes before the shareholders at a general meeting: *prima facie* that means they have the controlling interest in the company. Statutory percentage was applied in the above case for the purpose of determining 'standard profits'. In another English case, *B. W. Nobles Ltd. v. The Commissioners Inland Revenue*,¹⁵ it was held that a shareholder had, by reason of his share holding and having a casting vote, a controlling interest. In this case, *Rowlatt J.* observed :— "Controlling interest is a phrase that has a certain well known meaning; it means that a man whose shareholding in the company is such that he is the shareholder who is more powerful than all other shareholders put together in general meeting."

Statutory percentage was applied on the average amount of capital employed in the business where there was no pre-war trade year, for instance, where the company started its manufacturing and revenue operations on 6th October, 1913 by receipt of raw materials though it was incorporated in June, 1913.¹⁶

Similarly, where there is a transfer of business, a new business is set up after the transfer and the transferee cannot avail of the original business for the purposes of computation of a pre-war standard. Statutory percentage is applicable in such a case also, if there is pre-war trade year counting from the date of transfer. This was the case in *Mills Iron Syndicate Ltd. v. Commissioner Inland Revenue*¹⁷. In this case, the original owner of the business retired, having sold the lease of the business premises on 16th April, 1914. Assessment was computed by taking as the pre-war standard of profits for the purposes of Excess Profits Duty, a percentage standard based on the capital of the assessess (transferees) as at 15th April, 1914. The computation was held to be correct.

15. 12 T.C. 911 (925,926)

16. *The Birmingham Dr. Cattle Bye Products Ltd. v. Commissioner Inland Revenue*. 12 T.C. 92 (96, 97, 98).

17. 12 T.C. 73 (77,80, 82.)

11. Sub-Section (2) :—Standard period. As standard profits have to be determined under this Section, in order to find the Excess Profits chargeable, a period is to be elected by the assessee, which is known as the 'standard period'.

This period is in contrast with the chargeable accounting period the profit of which will be in question. The profits of this standard period will be compared with the profits of the chargeable accounting period in order to find out the excess profits chargeable.

The assessee has the option to elect, in fact, he is given the option to elect, 'previous year', determined under Section 2 (i) Income Tax Act, for the purposes of assessment for the year ending 31st March 1937 or 1938, or 1938 and 1939, or 1938 and 1939 or 1939, and 1940. Clause (d) has been added by the Select Committee. "We have by our amendment of sub-clause (2) provided as an additional option that the previous year as determined for the year ending on the 31st day of March, 1940, combined with that for the year ending on the 31st day of March, 1939, may be taken as a standard period, thus affording a considerable advantage to those businesses which made good profits during that period".

Reading together clauses (a) (b) (c) and (d) of sub-section (2), it is thus clear that a wide option has been given to the assessee to select his 'standard period' and choose from the years mentioned. The standard period is available according to when the business began first. If the person to be charged selects a one-year period, the whole of the profits of that period became his standard profits while if he selects a two-year period i.e. period ending 31st March, 1937 and 31st March 1939, or 31st March 1938 and 31st March, 1939, the standard profits are half the combined profits of those years.

The illustrations given under Section (6) (1) above indicate how the standard period may be selected. The provisions of the English law, as contained in Section 13 (3) to (6), Part III, are also the same.

12. Sub-Section (3):—The provisions of this sub-section have also been taken from the English law. (Section 18 (7) Part III Finance Act, 1939).

13. Within the period specified in the notice:—This period is sixty days *vide* Section 13 (1) *post*.

14. Makes an application:—An application by the assessee is essential, both under the English and the Indian law, if the matter is required to be determined by the Board of Referees.

15. Board of Referees:—The formation and composition of this Board is to be in accordance with the provisions laid down in Section 3 (5). See notes under Section 3 (5) *ante*.

16. Excess Profits Tax Officer shall refer:—The use of the term 'shall' means that a duty is cast on the Excess Profits Tax Officer to refer the application to the Board of Referees. Once an application has been made, the Excess Profits Tax Officer has no discretion left but to refer the same, whatever may be the result.

17. Board is satisfied:—The term 'satisfied' must mean satisfied by evidence to be produced by the applicant. Thus, while a duty is cast on the Excess Profits Tax Officer to refer the application to the Board, the Board must allow the evidence led by the applicant which it is for him to produce.

Where, on facts, the Board of Referees arrive at a particular finding and state: 'the Board take a different view of the facts', it means that they intend to find, on agreed facts, that they dissented."

Where there was material upon which the Board of Referees might arrive at the conclusion at which they did arrive, the finding of the Board was upheld by the High Court.¹ The above was a case under Section 21, Finance Act 1922 (English Law), relating to supertax and the finding of the Board of Referees an appeal was upheld on reference by the High Court. The question of principle involved therein

1. *The Aldwarke Co., Ltd. v. Commissioner Inland Revenue* 18 T C. 125, (187, 188).

must apply to the Board of Referees under the Excess Profits Duty Act also.

18. Proviso :—Under this proviso the maximum amount fixed is the statutory percentage rate. Even, then, the Board has been given the discretion to fix a greater amount in any particular case, when the peculiar nature of the particular business requires it for causes to be shown. This provision relating to the companies, has also been taken *verbatim* from the English law. [Section 13 (7) proviso (a) and (b) Part III Finance Act, 1939].

19. Sub-section 4 :—Sub-section (4) lays down the minimum amount of standard profits which is Rs. 36,000. This sum is to be taken into account when the standard profits computed under Section 6 (1) are less than the above sum. In the Bill as presented it was only Rs. 20,000. The Select Committee raised it to Rs. 30,000 and it was later raised to Rs. 36,000 by the Assembly

The Proviso to this sub-section provides for a case where the chargeable accounting period is not just or full one year, but either a greater or less period than that. In such a case, the minimum amount mentioned above shall be increased or decreased accordingly, as the case may be.

It is another case of adjustment, like the one contained in Section 6 (1) or that contained in Section 6 (3).

20. Sub-section (5).—This sub-section was added by the Select Committee. With regard to it they observed:—

“We have inserted a new sub-clause (5) to provide that profits made in Burma during the period when Burma was included in British India should not be included in the standard profits, unless they are also included subsequently, in the profits of the chargeable accounting period, which of necessity falls within a time when Burma is no longer a part of British India”.

Relief on
occurrence
of defi-
ciency of
profits.

Section 7. *Where a deficiency of profits occurs in any chargeable accounting period in any business, the profits of the business chargeable with excess profits tax shall be deemed to be reduced and relief shall be granted in accordance with the following provisions.*

- (a) *the aggregate amount of the profits so chargeable for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency of profits and the amount of excess profits tax payable in respect thereof shall be deemed to be reduced accordingly and the relief necessary to give effect to the reduction shall be given by repayment or otherwise ;*
- (b) *where the amount of the deficiency of profits exceeds the aggregate amount of the profits so chargeable for the previous chargeable accounting periods, or where there is no previous chargeable accounting period, the balance of the deficiency of profits or the whole of the deficiency, as the case may be, shall be applied in reducing any profits so chargeable for the next subsequent chargeable accounting period, and if and so far as it exceeds the amount of those profits, any profits so chargeable for the next subsequent chargeable accounting period and so on.*

Previous Law :—Section 7, Act X of 1919, contained similar provisions, empowering the Collector to make allowance in certain special cases. The maximum allowance that a Collector could make without sanction of the Commissioner was an amount that would not reduce the Duty (*i.e.* Excess Profits Duty) by more than 25%.

The provisions in Section 7 of the present Act, are different from the above provisions and have been taken bodily from the English law (Finance Act, 2 of 1939.)

Analogous Law :—Section 15 (2) Finance Act 2 of 1939 contains the same provision as Section 7. Section 15 (1) defines

what 'deficiency of profits' means. It is notable that relief by way of repayment or set off in cases of deficiency, available under the English Finance Act, 2 of 1915, was also similar, the underlying principle being the same in both cases. There were difficulties, however, under the old Act of 1915, in cases of change of ownership of business. In an English case¹, it was held that the words 'his profits' in the year 1915 Act showed that deficiency relief was available only to the person who held the business both during the period of deficiency and the period of profits against which it was sought to be set off.

In this case the Revenue's contention that where there has been a change of ownership of business, the new company could not claim relief was allowed by the High Court.

As those words do not exist in the 1939 Act, a change of ownership would not now affect a claim on account of deficiency.

Scope of Section 7 :—Section 7 provides for relief in respect of excess profits tax in cases where there is a deficiency of profits in a subsequent accounting period. In such a case, it will be considered that the profits of the previous accounting period have been reduced by the amount of the deficiency and repayment of Excess Profits Tax paid in an earlier accounting period can be claimed on this basis. This is clause (a).

Again, there may be cases in which there has been no profit in the previous period, or where the loss in the period in question is greater than the profits in the previous period. In such a case, after balancing the previous period profits with an amount of deficiency of the period in question equal to that sum, the balance of deficiency of the latter period (*i.e.* the period in question) may be carried forward. This is clause (b).

This scheme of balancing or setting off of losses against profits is meant to give a fair deal both to the Revenue and the assessee, for, according to it, the total losses and profits for the period at the end of the entire duration of Excess Profits Tax will be set off, one against the other, and the Revenue would thus receive exactly what it is entitled to for this total period.

1. *F.W. Millington Ltd. v C.I.R.* (1937) 12 T.C. 1081

It has already been stated above under "Analogous law," the provisions of the present Section 7 having been taken bodily from the English Law, the principle of the two must be the same. Hence, the principle of the English provision, as explained by *Sir John Simon*, the Chancellor of Exchequer, in the debate in the House of Commons, quoted hereunder should be of material assistance and value in following the provision of Section 7. "As in the case of excess profits duty, Clause 15 of the Bill provides for relief in respect of what are called deficiencies, and I think this is absolutely necessary. The matter may be put bluntly in this way that although a business may have paid excess profits tax in the first year, it would be entitled, when another year had gone by, to ask that the calculation would be made in respect of the whole period, so that, if its profits in the first year had been followed by a severe loss or a drop, it would not be treated unjustly. Otherwise injustice would be done. Thanks, however, to this provision, the tax-payer will be able to obtain relief for any other year in which the profits have fallen short. You may put it broadly like this. The aggregate amount of excess profits tax payable throughout the whole operation of the tax will be the tax corresponding with the net excess profits over the whole period, after allowing for any falling off profit in any year".

The above principle fully and clearly explains the matter of relief to be granted in cases of deficiency of profits provided for by this Section.

Deficiency of profits: — The term 'deficiency' in relation to profits, in Excess Profits Tax Act, is, after all a comparative term. When can you say that there is a "deficiency" in profits? The answer clearly is when the profits sought to be charged are less; less than what?

The simple reply is, less than the "standard profits" as determined under Section 6. If the profits are 'in excess' of the 'standard profit' you tax them under the Act, but if they are less than or fall short of standard profits, Section 7 provides that, it is not only that they are not chargeable, as, of course, they are not but, repayment of Excess Profits Tax in respect of previous

accounting period or periods already paid can be claimed on this ground. So that deficiency of profits is to be judged by a comparison with standard profits. Profits less than standard profits are deficiency. Then, losses may cause deficiency for profits would have been over and above the standard profits but for the loss or losses. Section 15 (1), English Finance Act, 2 of 1939 clearly indicates what deficiency is and what shall it be its amount or extent. (See part III page 5.)

Under Section 2 (10) of the Act a 'loss' is a 'loss' computed in the same manner as profits (computed under Schedule 1. Rules) so that losses and profits under the Act are to be computed in the same manner as profits. Under Section 14 (3) English Act also losses and profits are to be computed in the same way for Excess Profits Tax purposes. From all that has been stated above, and in particular from the provision of Section 7, it naturally follows that the question of there being a deficiency of profits in the sense above stated, has to be considered afresh in every chargeable accounting period.

Clause (a):—Clause (a) embodies the principle of set off being applicable to Excess Profit Tax cases. The terms 'aggregate amount' and 'the previous chargeable accounting periods' indicate and relate to more than one 'accounting periods' having gone by already, when the question of 'deficiency' in a subsequent period arises. But, there may be cases where only one accounting period of profits only has rolled by when the question of deficiency in the following subsequent period arises and its set off is allowed. In such case, the term 'aggregate amount' would have to be read only as being 'amount' and the term 'previous chargeable accounting period' will be read as 'chargeable accounting period.

The expression '*So chargeable*', means chargeable with Excess Profits Tax "*Deficiency of profits*" means the deficiency of the profits of the period in question. Clause (a), therefore, relates to cases where there were profits in a previous period or periods, charged to Excess Profits Tax and there is a deficiency in the subsequent or following period, which would be set off

against profits of the previous periods or periods. Relief under Section 7 (1) (a) shall be given in such a case by 'repayment' or otherwise.

The term 'repayment' is quite clear, meaning that the Excess Profits Tax paid in respect of the profits in excess of and over and above the standard profits shall be repaid or refunded to the assessee, after balancing or setting off previous periods' excess with the deficiency of the period in question, or in hand. The term 'otherwise' would seem to indicate an adjustment by set off.

Clause (b). The principle of the provisions of this Clause is also practically the same as that of those in clause (a). As is obvious, set off may be either in respect of the profits of a previous period or it may take the form of 'carrying over'. Clause (b) relates to a set off of the latter class. This would be the case when there has or have been no profits in the previous period or periods against which the deficiency of the period in question may be set off or alternatively. There may be cases, when a certain amount of deficiency may be left over after setting off a greater portion of it as against the profits of the previous period or periods. This entire, or balance of deficiency of the period in question may be "carried forward" to be set off against profits of subsequent period. This is clause (b) of Section 7. Thus, while clause (a) provides for a set off of deficiency of the period in question against the profits of a *previous* period or periods, already charged to Excess Profits Tax, clause (b) provides for a set off of the said deficiency, by carrying it over, against the profits of the following period or periods, till it is adjusted in full. The principle of the scheme could not be given effect to otherwise, for it is evident that in cases where there are no profits of the previous period or periods against which the deficiency or loss can be set off, there can be no repayment. And there can be no repayment either when the earlier profits were less than the deficiency in hand. Hence, the deficiency has to be carried forward.

The expression 'amount of deficiency of profits' in this clause means the amount of deficiency of profits for the period in question or in hand.

The balance of the deficiency...shall be applied:—

These words indicate a case where there were profits in the period but not enough to absorb the entire deficiency. The part left unabsorbed only will in such a case be carried forward to be adjusted with reference to the profits of the subsequent chargeable accounting period. The point of the Section in allowing set off and repayment will be quite clear from the English cases cited hereunder wherein it has been held that repayment of Excess Profits Duty are profits assessable to Income tax. There was a *similar* but not the *same* relief granted by Section 7 of the Excess Profits Duty Act, 1919. It differed from the one given here in details and in other respects.

In connection with the question of set off of loss it is worth noting that there is no provision in Excess Profits Tax law under which deficiencies suffered in one business could be set off against excess profits made in another. This was the finding in the English case *Wood v. The Commissioner Inland Revenue*.¹ It was followed in *Birds Potter & Hughes Ltd. v. The Commissioner Inland Revenue*.² In this case, assessee company carried on the business of ship-brokers, acting as brokers to ship and ship agents. In the course of this business they acquired ships jointly with other companies. It was found as a fact that the two undertakings were separate businesses and therefore the deficiency in one business was not allowed to be set off against the profits of the other business.

Excess Profits Duty repaid, profits assessable to Income Tax. It is notable, further, that Excess Profits Duty repaid has been held under the 1915 (English) Finance Act to be ascertained and assessable profits in the year of repayment.³ Where the assessee to whom Excess Profits Duty had been repaid, due to having sustained losses in November 21, on his transfer of business in March, 21, he was assessed to Income tax on Excess Profits Duty amount believed as profits assessable⁴. Similarly in another English case,⁵ having

1. 1925 S.C. 144

2. 12 T.C. 976

3. *Eglinton Silica Brick Co., Ltd. v. Marrian* 9 T.C. 92

4. *Hill v. Mathews* 10 T.C. 25

5. *A. & W. Nestill Ltd. (In Liquidation) v. Mitchell* 11 T.C. 211.

sustained heavy losses in its business for the accounting period, 1st May to 25th November, 1920, the assessee company having gone into liquidation and ceased business on latter date, became entitled to the repayment of the whole of Excess Profits Duty paid for four years ending 31st April 1919. The Excess Profits Duty so paid was deducted in each year from the income assessable to tax.

Repayment of Excess Profits Duty having been made to company in April 1924, assessment to Income-tax for 1924-25, in respect of repaid amount was held good. Repayments of Excess Profits Duty in *Kirks Trustees v. Commissioner Inland Revenue* ⁶ also was held to be profits assessable to Income-tax.

Amount of Excess Profits Duty repaid on a revision of Company's Excess Profits Duty liability on the basis of half yearly instead of yearly accounting periods and in respect of postponed renewals and repairs were held to be income or profits assessable to Income-tax under case VI. Schedule D. ⁷

In *Tarrant v. Roberts* ⁸ set off of a sum due by the assessee against a debt of a like sum due from him to the Revenue was made by mutual agreement. It was held to be profits assessable to income tax.

Section 8 (1) *As from the date of any change in the persons carrying on a business, the business shall, subject to the provisions of this Section, be deemed for all the purposes of this Act except for the purposes of determining the amount of the statutory percentage, to have been discontinued, and a new business to have been commenced.*

(2) *Where the change took place before the 1st day of September, 1939, and consisted in the death or retirement of a partner, or the taking in of a partner, the persons carrying on the business after the change may, by notice given in writing before the prescribed date to the Excess Profits*

6. 11 T.C. 828

7. *Olive & Porrington Ltd. v. Rose* (1919) 14 T.C. 701 . *

8. (1930) 15 T.C. 754

Tax Officer, elect that, for the purposes of the provisions of this Act relating to the computation of standard profits, the business shall not be deemed to have been discontinued.

(3) *A business shall not, for the purposes of the provisions of this Act relating to the computation of standard profits, be deemed to be discontinued by reason of any change occurring on or after the 1st day of September, 1939, in the persons carrying it on, and the standard profits of the business in relation to any chargeable accounting period shall be computed accordingly, and, in particular, in computing the capital employed in the business after the change, no regard shall be had to any consideration given in respect of the transfer of the business or any of the assets thereof on the occasion of the change.*

(4) *Where, on or after the 1st day of September, 1939, two or more businesses are amalgamated, the resulting business shall be treated for the purposes of the provisions of this Act relating to the computation of standard profits as if—*

- (a) it had been in existence throughout the period during which there were in existence any of the former businesses ;*
- (b) any profits made or losses incurred or capital employed in any of those former businesses had been made, incurred or employed in the resulting business ; and*
- (c) any assets of any of those former businesses had become assets of the resulting business when they became assets of the former business ;*

and, in particular, in computing the capital employed in the resulting business, no regard shall be had to any consideration given in respect of the transfer of any of those former businesses or any of the assets thereof on the occasion of the amalgamation.

(5) *Where, on or after the 1st day of September, 1939, part of a business is transferred as a going concern by the person theretofore carrying it on to another person, the part transferred and the part not transferred shall each be deemed, for the purposes of the provisions of this Act relating to the computation of standard profits to be a continuation of the original business, and the said provisions, including the provisions of this Section relating to amalgamations, shall apply accordingly, subject to any necessary modifications :*

Provided that, for the purposes aforesaid, such apportionments shall be made of the profits made, and losses incurred, and the capital employed, in the original business, and of any assets of the original business as may appear to the Excess Profits Tax Officer, or on appeal in the prescribed time and manner to the Board of Referees, to that Board, to be just,

(6) *Notwithstanding anything in the foregoing provisions of this section, where a business was carried on immediately before the 1st day of April, 1936, and that business, or the main part of that business, was transferred after the said day and before the 1st day of September, 1939, by the person carrying it on to another person, the Excess Profits Tax Officer, if he is satisfied that the business carried on after the transference was not substantially different from the business or part transferred, shall, on the application of the person carrying on the business after the transference, treat that person, for the purposes of the provisions of this Act relating to the computation of standard profits, as if he had carried on the transferred business or part of the business as from the date of the commencement of that business, subject, however, to such modifications (including modifications as respects the computation of capital) as he may consider just.*

(7) *Where, on or after the 1st day of September, 1939, a partner in a firm carrying on a business to which this Act applies dies, then notwithstanding anything contained in sub-section (1) any deficiency of profits in respect of any chargeable accounting period ending on or before the date of*

his death shall, if it has not been fully applied in reducing the profits of any chargeable accounting period under Section 7, be carried forward and applied in reducing any profits from the same business carried on by the surviving partner or partners in the first chargeable accounting period after the death of the partner, and if and so far as it exceeds the amount of those profits, in reducing any profits from such business in the next subsequent chargeable accounting period and so on.

1. Previous Law:—Section 14, Excess Profits Duty Act, 10 of 1919 contained provisions similar to those contained in Section 8 of this Act. The provisions of Section 8 of the present Act are, however, more detailed and amplified and have been taken *almost verbatim* from the English law as embodied in Section 16, Finance Act 2 of 1939.

2. Analogous Law : Indian Law:—Section 25 and 26 Indian Income Tax Act, 1922 (amended, 1939) contain similar provisions.

English Law:—Section 16, Finance Act, 2 of 1939, Part 111.

3. Scope of Section 8:—The Select Committee having altered the date on which excess profits became liable to taxation, from 1st April to 1st September, 1939, the word 'April' has, in Section 8, sub-section (2), (3), (4), (5) and (6) been consequently changed into 'September', wherever it occurred. As the marginal note of the Section itself points out, Section 8 deals with cases of succession to and amalgamation of businesses. The scheme of Excess Profits Taxation has first to be understood before the provision of Section 8 can be followed fully. As it is, Excess Profits Tax is, in effect, a tax on business and not on person. This explains the provisions of Section 8 (1) which are a true copy of Section 16(1), English Finance Act, 2 of 1939. No sooner a change in the ownership of the business or in the person carrying on the same occurs, the old business ceases and a new business is supposed to have commenced from that date.

Sub-section 2) contains an exception to the rule of law

as to Excess Profits Tax. It enacts that the charge may be ignored and old business may be taken to have continued (1) if it is a case of partnership, wherein there has been a change due to death or retirement of a partner or the taking in of a new partner and (2) the change has taken place before 1st September, 1939. These two are the conditions precedent to the provisions of sub-section (2) coming into play. In such a case, persons continuing the business after the change may elect that for the purpose of computation of standard profits, the old business shall not be deemed to have been discontinued. The condition is that the persons carrying on the business after the change must give the Assessing Officer notice that he is so electing, that is, taking the business to have continued after the change.

It is notable that notice under Section 8 is to be given to the Excess Profits Tax Officer, while under the English Finance Act, 2 of 1939 Section 16 (2) it is to be given to the Commissioners *i.e.* Commissioners of Inland Revenue, who are the assessing officers in United Kingdom, performing the same function as Excess Profits Tax Officer under this Act.

Continuance or discontinuance of previous trade or business *i.e.* business as carried on before the change, is important in connection with the computation of standard profits, for it is the latter upon which hinges the determination of Excess Profits and consequently the Excess Profits Tax.

The above are the provisions of sub-section (2) to Section 8 and they qualify the provisions of sub-section (1). The crux of the point as to change of ownership is, however, contained in Section 8 sub-section (3). If a change in the person carrying on a business has occurred before 1st September 1937, it is disregarded. It determines, however, the date of the commencement of business which, under Section 6, is to determine or decide which form of pre-war standard is to be taken and what is the standard period available. To take a concrete instance, if the particular business began in 1930, on the face of it, it has a profits standard, that is to say, its profits are to be obtained

by reference to the profits of a standard period. The standard period will be either 1935-1936 or 1936-1937. If a business changed hands on 1st June, 1937, the standard period will be 1935-36, or 1936-1937. If it changed hands on 1st June, 1936, the standard period will be any consecutive period of 12 months ending before 30th June, 1937. If the change took place in 1936, no question of standard period arises, as the percentage standard applies.

The provision in the latter part of sub-section (3) to Section 8, contained in the words, 'and in particular.....the occasion of the change' is apparently meant to save the excess profits taxable from being affected by any fictitious entry of consideration for transfer being larger in amount than the amount of capital invested in the business already.

For, standard profits have to be adjusted with reference to the capital employed in the business and any change therein. The latter part of Section 8 (3) prevents the above principle from applying when there is an increase in the amount of capital consequent on the transfer of the business. The object is to keep the standard profits unaffected by any change in the persons carrying on the business and the very same object and principle is distinctly noticeable in sub-section (4) of Section 8.

Sub-section (4) deals with the amalgamation of business, as distinct from 'succession', the provision of which as contained sub-sections (1) to (3) have already been noted above.

According to sub-section (4), therefore, if the amalgamation of two or more businesses has taken place on or after 1st September 1939, the change by amalgamation will take back the amalgamated business to the date of commencement of the former business and for the purposes of computation of 'standard profits', the resultant business shall be taken to have existed during the entire period from the date when the first of the amalgamated businesses began. As a result, the profits and

losses and assets or capital of the former business shall become the profits, losses and capital of the resultant business.

One important effect of this position consequent on amalgamation would be that the pre-war standard may be affected. For instance, if a business started in 1937, and, as such, having no pre-war standard, is amalgamated with the one standard in 1938 the standard, so far as the 1937 business goes, is changed. For, it would have a percentage standard if it was not amalgamated, but on an amalgamation the standard of the amalgamated business will be a profits standard.

Under sub-section (5), the above principle as to amalgamation will apply also in cases of transfer of a part of business as a going concern. Apportionment of profits, losses and capital shall be made in such a case either by the Excess Profits Tax Officer or by the Board of Referees in appeal. Lastly, in the case of a business which existed and was carried on immediately before 1st September 1939, if the same or main part of it is transferred after the above date and before 1st September, 1939 the transferee may apply to the Excess Profits Tax Officer that the transfer may be disregarded and that he may be deemed to have carried on the business from the date of commencement of the business by the transferor. This, however, is subject to the condition that the Excess Profits Tax Officer be satisfied that the business carried on after transfer was not substantially different from that which was transferred. The Excess Profits Tax Officer has also the discretion to make such modifications including modification as to computation of capital, as he may deem fit to make in such a case. Up to this point the provision as contained in Section 8 Excess Profits Tax Act, are quite the same as in Section 16, Finance Act 2 of 1939. By the proviso to sub-section (6) of the English Act 1939, however, an appeal is provided for to Board of Referees in cases of modifications made in sub-section (6) while no such appeal is provided for in Section 8 (6). It will thus be seen that the principle underlying the entire provisions of Section 8

is that any change in the person or persons carrying on the business, the profits of which are sought to be assessed to Excess Profits Tax, may be ignored by the person carrying on the business at the time of assessment if he so elects. This is so, irrespective of the fact whether the change is due to succession on death or transfer, or to amalgamation of two or more businesses or transfer in part of a business as a going concern.

It is notable that the position under the United Kingdom Finance Act, 1915 was different. The person succeeding, or the new owner, as he may be rightly called, could only get the benefit for the period during which he held the business, the period of his predecessors' holding the business being ignored. Thus, in the English case, *Commissioner Inland Revenue v. Gilters*,¹ the owner of a business having died in September, 1915, the business devolved on his son. The accounting period of the business ended 30th September, every year. In the period that ended 30th September, 1915, there was a deficiency, while there was an excess in the period ending 30th September, 1916. The portion of the deficiency that occurred during the space of time between the death of the father and the 30th September, 1915 was the only one that the son succeeding to the business was allowed to set-off against the excess of profits.

The same principle was followed in another English case, *Fred. W. Millington (1920) Ltd. v. The Commissioner Inland Revenue*,² the transferee of the business by sale was a company, (the new company) the transferor also being a company and syndicate (the Old Company). For the accounting period ending 31st December 1920, there was a deficiency and in the earlier periods there were excess profits chargeable. The old company ceased to run the business on the 25th October, 1920 and so the Commissioners Inland Revenue determined that the amount of deficiency was a proportion of the total sum of deficiency from 1st January, 1920 to 25th October, 1920 and

1. (1920) 1 K. B. 563.

2. 12 T. C. 1081 (1087, 1088, 1091).

that any loss sustained after that date was not the one sustained by the old company.

Relief was declined to the old company as not being owners of the business at the end of the final accounting period. The computation was accordingly made as follows:—

Deficiency for the period 1st January,			
1920, to 31st December, 1920 ...	...	43,914	-0-0
Proportion of deficiency from 1st January, 1920, to 25th October, 1920 $\frac{299}{366}$ ths			
of £ 43,914 ...	...	35,875	-0-0
<hr/>			
£ 35,875 at 60% ...	...	21,525	-0-0 (Duty)
Less set-off against amount of duty owing by the old company in respect of accounting periods to 31st December, 1919.			
		16,834	-12-0
<hr/>			
		£ 4,690	-8-0

The High Court upheld the computation on the above lines

The new provisions of Section 8 have altered the position.

As has already been pointed out above, one great effect of the new provisions relating to succession or amalgamation of business is that a business which may have only a percentage standard, all alone by itself, may, on amalgamation have a pre-war standard, (according to Section 8 sub-section (4)). This was not possible under the Finance Act, 1915. In another English case,³ a trader retired from business in April, 1914 which was carried on later by a newly formed company, wherein some of the saleswomen of the old business joined. Three saleswomen of the former business were taken into service by the new company. On assessment to Excess Profits Duty, the new company claimed standard profits, on the ground that their business was a continuation of the old one. The Commissioners Inland Revenue allowed only statutory percentage basis on the capital employed in the business, discontinuing the duration of the old

3. *Mills Iron Emelie Ltd. v. The Commissioner Inland Revenue* 12 T. C. 87 (77,80,82).

business. It was held that Commissioner's computation and basis was correct and that the subsequent business was a new one.

All this law is now rendered nugatory by the provisions of the new English law on the point (Section 16 Finance Act, (2) of 1939.) The Indian law (contained in E. P. T. Act, 1940.) follows the lines of the United Kingdom Finance Act, (2) 1939.

4. Sub-section (1) :—The rule of law contained in this sub-section enunciates the general principle relating to change in the persons carrying on trade or business. Generally speaking, on a change taking place, *new business* shall be deemed to have commenced. This is the general rule and it is in consonance with the old law as contained in Finance Act, 1915. It may be stated in this connection that a '*new business*' and continuation of old business are absolutely two different things. On death of the holder of a business, his executors may carry on the old business just to realize assets and may not thus be assessable to Excess Profits Duty for carrying on the old business. This was the case in *Cohan's Executors. v. The Commissioners Inland Revenue*.⁴ In this case, the executors of the deceased, declining to cancel a contract made by the latter, agreed to deliver the ship contracted for on completion and did deliver the same and made profit. The executors contended that they simply realized the assets of the deceased. Their contention was upheld by the Court of Appeal.

Sub-section (1) of Sections 8 contains a rule of law as to Excess Profits Tax, to which there is no exception, except in one single case. The rule is that a change in the person or persons carrying on a business necessarily involves a ceasing of old business and a commencement of a new one. There is no exception to this rule, except only in relation to computation of standard profits. The rule holds good universally, irrespective of the change having occurred before or after the 1st September, 1939 or of the nature of the change (*i.e.* in the constitution of partnership). Accordingly, under sub-section (1), a person carrying on the business after it has changed hands is not liable

to Excess Profits Tax in respect of chargeable accounting period before the change. The person or persons chargeable to Excess Profits Tax in respect of any chargeable accounting periods is or are the person or persons carrying on the business in that period. A successor to a business is consequently not chargeable in respect of the profits of the chargeable accounting period before the change.

Viewed in the light of 'deficiency relief' as contained in Section 7 *ante*, the rule of law contained in Section 8 (1) gains a new aspect. To take a hypothetical case, suppose that there has been a change in the persons carrying on a business, involving a change in the constitution of partnership by retirement of a partner. Suppose, further, that there was an unabsorbed deficiency, under Section 7, available for being carried forward, when the above change took place. As, in this case, the excess profits arising are not profits arising from business *i.e.* the business in which the deficiency occurred, it is clear that, as a result, the benefit of unabsorbed balance of deficiency will be lost.

A similar question may arise in case of amalgamation of a business with another, in which case also the unabsorbed deficiency cannot be availed of on a change accordingly.

5. Subject to the Provisions of this Section :— These words clearly indicate that the rule contained in this sub-section is subject to the exceptions following, as contained in sub-sections (2) to (6).

6. Except for the purpose of determining the amount of the statutory percentage :— These words were added to this sub-section in the Legislative Assembly at a motion by an Hon'ble member (*Mr. S. P. Chambers*) who indicated the object of the amendment to be "to treat as new business for the purpose of computing the standard percentage in clause 2 only those businesses which are genuinely new businesses. Where there has been merely change in partnership or a change in ownership in an old business, there is no occasion to give a higher statutory percentage. Without this

amendment, they would be deemed to be new businesses for all purposes of the Act".

Another Hon'ble member (*B. Baijnath Bajoria*) seeking the clarification of certain points about succession and amalgamation, said :— "Will not the effect of this amendment be this ? Supposing a business has been sold to a different party altogether. The successor has got no concern whatsoever with the predecessor in business. Who is going to pay the tax ? Supposing in one chargeable accounting period, party A was the owner of that business for five months and for the next seven months party B, quite different persons from A, owns the business. It is not the case of a change in partnership or the death or retirement of a partner. Who is going to pay in that case ? Will it mean that the party purchasing the business is going to pay for the whole year, even for that part of the year in which the selling party was the owner and appropriated the profits to himself ?

The motion as to amendment was adopted after all. The following debate helps to clarify the doubts involved :—"Sir, may I explain ? Under sub-clause 8, business is deemed for the purposes of this Act to have been discontinued and a new business to have been set up as from the date of sale or change in ownership. When we have, therefore, treated the business as a new business we then turn back to the definitions of accounting period and chargeable accounting period, and that is related to a business. Therefore, where a business is deemed to be a new business a new chargeable accounting period is automatically started and the chargeable accounting period of the old business automatically ceases. And, therefore, the tax is payable by the person carrying on the business up to the date of change in respect of the profits up to the date of change and thereafter by the person who succeeded him." (*Mr. S. P. Chambers.*)

"That is all right, but what about this amendment moved by my Honourable friend that it will not be deemed to be a new business so as far determining the statutory percentage is concerned" (*Babu Brijnath Bajoria*).

"There the expression is not 'statutory profits', but 'statutory percentage' and, therefore, the clause applies the new business provision for all the purposes of the Act except merely for the purpose of determining the statutory percentage under sub-clause (22) of clause 2 which reads: "Provided further that where the business was commenced on or after the 1st day of December, 1938, the foregoing percentages shall be increased by two per cent in each case" When that was put in the intention was that in respect of what I might call brand new business there should be higher percentages. By putting in, this amendment we say that this shall not apply to a business which is an old business but has been deemed to be a new business because of the change of ownership" (*Mr. S. P. Chamber.*)

"That removes my difficulty to a certain extent but I have still some doubts. I want to know whether the purchaser will pay only on the profits earned by him or he will have to pay also the excess profits made by the previous owner" (*Babu Baijnath Bajoria*). "No" (*Mr. S. P. Chambers*) "Does that mean that he will pay on the profit which he earns himself?" (*Babu Baijuath Bajoria*.)

"Yes" (*Mr. S. P. Chambers*).

"Then, I have no objection" (*Babu Baijnath Bajoria*)

7. Sub-section (2):—Before the 1st day of September, 1939:—

This sub-section relates to a case of change taking place before the 1st September, 1939. The change must have been caused by either (1) *death or retirement of a partner* or (2) *the taking in of a partner*. The effect of this sub-section is that the change will be ignored if the person succeeding on change so elects. In an English case (*Mills from Emelie Ltd. v. Commissioner Inland Revenue* 12 T.C. 73), a millinery business had been carried on for the last 40 years by one Miss W, under the name of "Emelie"; in April, 1915, she retired from business, sending a notice of retirement to all her customers. Before retirement, she handed over to five of her saleswomen their own

particular order books, containing the name and address of customers who had always resorted to the particular saleswomen. Miss Mills was one of these five saleswomen and she, in conjunction with their former employees of Miss W., formed a company who started business in the same street. The company took into their employment three of the saleswomen who had received order books, and about a third of the other employees of the original business. The company did not take over any assets, stock, book debts, contracts or liabilities of the late business, and no agreement or payment was made relative to the goodwill of that business. The company, in so far as they traded with the old customers, and they had very few others in the material period, followed the same lines of trading in relation to prices charged, system of payments etc., as those adopted in the original business.

∴ In assessing the company to Excess Profits Duty, Commissioners of Inland Revenue computed the pre-war standard of profits on the basis of the statutory percentage on the capital employed during the accounting period. The company, however, claimed a profits standard based on the profits of the original business. It was held that the person setting up new business was not entitled to have the pre-war standard of profits computed by reference to profits of the old business, that the company had set up a new business and that the original business profits could not be taken into account in computing pre-war standard profits.

The sub-section will apply only if the change occurred before 1st September, 1939.

8. Notice in writing :—Notice is also a condition necessary for the option given in this sub-section to be exercised.

There is no mention of time limit within which after the change notice is to be given. Another question with reference to notice is that it is only the person holding the business immediately after the change who is competent to give notice. A person holding it on a second change after the one that occurred before 1st September, 1939 will, *ex hypothesi*, be not qualified to give the notice.

9. **Prescribed date** :—This should be the date prescribed for filing a return of excess profits under Section 13 *post*.

10. **Sub-section (3)**—‘On or after the first day of September 1939’—While the change under sub-section (2) related to the period before 1st day of September, 1939, the change contemplated by this sub-section is the one that takes places ‘on or after’ that date. The first portion of this sub-section is quite clear and hardly needs any explanation.

11. **‘In particular.....change’** :—As already noted above under ‘scope’, the change is to be ignored—and then these words are also intended to avoid the excess profit being affected by a larger amount being shown as consideration of transfer on a change. Similar words occur in the following sub-section (4) with the same object.

12. **Sub-section (4)** :—As against cases of succession covered by sub-section (2) and (3) sub-section (4) relates to cases of amalgamation of two or more businesses.

The principle of the provisions of this sub-section also is the same, viz. any change on amalgamation shall be ignored for purpose of standard profits computation, provided the amalgamation took place on or after 1st September, 1939. The period, the profits and losses or capital employed in and the assets of the business resulting on amalgamation shall be taken to be the period, profit and loss or capital and assets of the former business according to clauses (a) (b) and (c) of sub-section (4).

The last part of the sub-section provides the same safeguard against excess profits being affected by any larger consideration of transfer, as is proved in sub-section (3). Amalgamation could also affect the change to application of standard profits instead of statutory percentage.

13. **‘Two or more businesses are amalgamated’** :—The important point in connection with this sub-section is to know *what is amalgamation*. When can one business be said to be amalgamated with another. Sub-section (4) deals with

the case of two or more businesses that were formerly held by different persons being held by one and the same person. That is 'amalgamation'. Where control of one business by acquiring share capital of another company is acquired, it is not a case of amalgamation but of merger, and being a case of company it is one under Section 9, relating to inter-connected companies.

The date of commencement of a business is the most important item in this connection. In cases of amalgamation the date of commencement of amalgamated business is the date of the commencement of the business that has been in existence the longest. As a result of this, it follows that in computing the capital employed in the business resulting from amalgamation, any consideration which may have passed on the occasion of the amalgamation, in respect of any of the former business, or of assets of them, will have to be disregarded. This is a necessary corollary of the principle of this sub-section. Although the principle of the sub-section is clear enough, its application may, at times, raise difficulty. To take an example:— Suppose two businesses A & B that commenced on 1-1-1936 and 1-4-1939 respectively are amalgamated on 31st December, 1939, the date of commencement of the amalgamated business will be taken to be 1-1-1936.

This is apparently the right construction of the words of Section 8 (4) (a) looking to their plain meanings as they stand. And, even if another business, was to amalgamate with A & B the date of commencement of the amalgamated business ought, on the face of it, to be the same *vis.* 1.1.1936. Thus if a third business C was to amalgamate with A & B the date of the commencement of their business (*i.e.* 1.1.1936) thus amalgamated should also be the same. Another interpretation, however, of the words of Section is also possible which would seem to create difficulty. It is this : Supposing the third amalgamated business C commenced on 1.1.1939 *i.e.* before the date of amalgamation of A & B (1.12.1939). The question is, can it be said, if the business thus formed by the amalgamation of A, B & C, commenced on 1.1.1939. This would be possible only if the date of amalgamation of A & B business to be taken to be the date of commencement of the amalgamated business (A & B) which is not the case because the date of commencement of the amalgamation of business is 1.1.1936 the date of this commencement of the earlier (or former business) A and not the date of amalgamation of A & B Apparently, such interpretation creating the difficulty is not a correct one and is obviously imaginary. Another view is possible which would, in consonance with the right interpretation of the words of the Section, be also correct. For instance the date of commencement of third business C amalgamated with

(A plus B) is 1.6.35, a date prior to 1.1.36, in such a case the date of commencement of the amalgamated business A plus B plus C could rightly be taken to be 1.6.35. Business "C" being "any former business" of three A B & C

Illustration of Amalgamation under section 8 (4):—Suppose the business of A & B amalgamated on 31st March, 1939.

	Profits	Capital.
The position of business A during 1936-37 for assessment year of 1937-38 ...	25,000	15,000
The position of business B during 1936-37 for the assessment year of 1937-38 ...	23,000	13,000
The position of amalgamated business during the chargeable accounting period ...	40,000	70,000

Computation of excess profits will be as follows :—

Profits during the chargeable accounting period		40,000
Less standard profits $\frac{1}{2}$ of (25,000 plus 23,000)	24,000	} 29,600
Plus for increased capital (Rs. 70,000 less $\frac{1}{2}$ of Rs. 28,000 or Rs. 14,000) = 56,000 @ 10%	5,600	
Excess Profits	...	10,400

14. Sub-section (5):—This sub-section relates to a case where part of a business only is transferred as a going concern. In such a case both the transferred and the non-transferred parts shall be deemed to be a continuation of the original business. Apportionment and adjustment of profits and losses and capital and assets shall be made by the Excess Profits Tax Officer or, in case of appeal, by the Board of Referees. In United Kingdom it is made by the Commissioners or the Board.

Thus, the effect of this sub-section is that the date of commencement of both the transferred and non-transferred parts of businesses is taken to be the date of commencement of the original business.

The underlying principle is that on the breaking up of a business, on or after 1st September, 1939, standard profits are not to be computed on the assumption that a fresh start in business is made, as is the case in amalgamation. The original date of commencement will be taken into account, so that transfer of a part of business (or breaking up of a business) is different from amalgamation.

15. Sub-section (6):—Sub-section (6) is practically a modification of sub-section (1), being a concession in favour of the person who carried on a business, (or the main part thereof) which commenced immediately before 1st April 1936, and which was transferred between that date and 1st September, 1939. The essential part of the sub-section is that the Excess Profits

Tax Officer is satisfied that, after transfer the transferee carried on a business not substantially different from the business formerly carried. The transfer may not necessarily be of the whole but of a part of business only. The sub-section will not apply if it is otherwise and there has been a substantial change.

The word 'shall' indicates that where such an application is made, it is binding on the Excess Profits Tax Officer to allow the concession laid down in the sub-section.

The United Kingdom law on the point is different, the word used in Section 16 (6) Finance Act (2) 1939, being 'may', and it is the Commissioners who deal with the case under the United Kingdom law. There is a right of appeal under sub-section (6). The Select Committee wanted to add an explanation to sub-section (6) of Section 8 to emphasise that the sub-clause applies where two or more businesses were amalgamated after the 1st day of April, 1936, and before the 1st day of September, 1939, but on being satisfied that the sub-clause already clearly applies to this case.

Sub-section (7):—Sub-section (7) to Section 8 has been added by the Select Committee and did not find place in the Bill as presented to the Assembly. With regard to this the Committee observed:—"We have added a new sub-clause (7) to provide for the carrying over of a deficiency of profits where a change takes place in the persons carrying on a business by reason of the death of partner after the 1st day of September, 1939, a contingency not provided for by sub-clause (1) or elsewhere in the clause".

Section 9. (1) *Where any interest, annuity or other inter-connected annual payment, or any royalty or rent, is paid by companies, one company to another company, and one of those companies is a subsidiary of the other, or both are subsidiaries of a third company, the capital, profits and losses of both companies shall be computed for the purposes of this Act as if:—*

(a) *the interest, annuity, annual payment, royalty or rent were not payable;*

(b) *any debt in respect of which any such interest is payable did not exist; and*

(c) *any asset in respect of which any such royalty or rent is payable were the property of the company paying the royalty or the rent.*

(2) *Where—*

(a) *a company (herein after referred to as "the principal company") is resident in British India and is not a subsidiary of any other company resident in British India; and*

(b) *during, the whole or any part of any chargeable accounting period of the principal company, another company, whether or not resident or carrying on business within British India (hereinafter referred to as "the subsidiary company") is a subsidiary of the principal company,*

the following provision of this section shall, subject to the provisions of Section 5, have effect in relation to that chargeable accounting period.

(3) *If the subsidiary company is a subsidiary of the principal company throughout the chargeable accounting period, such capital employed in, and profits or losses arising from, the business of the subsidiary company as is employed or arises in—*

(i) *the chargeable accounting period; or*

(ii) *any year constituting or comprised in the standard period of the principal company,*

shall be treated for the purposes of this Act as if it or they were capital employed in, or as the case may be, profits or losses arising from, the business of the principal company.

(4) *If the subsidiary company is a subsidiary of the principal company during part only of the chargeable accounting period, the excess or deficiency of profits of the subsidiary company for that part of that period shall be treated as increasing or, as the case may be, decreasing the excess or deficiency of profits of the principal company for the whole period and shall not be deemed to be an excess or deficiency of profits of the subsidiary company*

In this sub-section, the expressions "excess" and "deficiency" mean, in relation to profits, an excess or deficiency in relation to the standard profits of the subsidiary company or, as the case may be, the principal company

(5) In any case to which sub-section (3) or sub-section (4) applies, such alteration, if any of the periods which would otherwise be the chargeable accounting periods of the subsidiary company shall be made as the Central Board of Revenue may direct.

(6) For the purposes of this Section, a company shall be deemed to be a subsidiary of another company if and so long as not less than nine-tenths of its ordinary share capital is owned by that other company, whether directly or through another company or other companies, or partly directly and partly through another company or other companies.

(7) The amount of ordinary share capital of one company owned by a second company through another company or other companies, or partly directly and partly through another company or other companies shall be determined in accordance with the provisions of the Third Schedule

(8) In this Section and the Third Schedule references to ownership, shall be construed as references to beneficial ownership, and the expression 'ordinary share capital' in relation to a company, means all the issued share capital (by whatever name called), of the company other than capital the holders whereof have a right to a dividend at a fixed rate but have no other right to share in the profits of the company.

(9) The principal company shall be entitled to allocate its subsidiary company or companies the respective proportionate shares of the excess profits tax payable by the whole group.

(10) The excess profits tax payable by virtue of this section by the principal company in respect of the profits of any subsidiary company shall, for the purposes of Section 12, be deemed to have been paid by the subsidiary company and not by the principal company.

1. **Previous Law, Section 9** :—No such provisions existed in the Excess Profits Duty Act 10 of 1919, as are contained in Section 9 of the 1940 Act.

The only provision relating to companies was the one in Section 10, according to which a liquidator of a company which was being wound up was to give notice to the Collector that the company was chargeable to Excess Profits Duty.

2. **Analogous Law** :—Section 17, (United Kingdom) Finance Act (2) of 1939 contains the same provisions. In fact, the provisions of this Section have been taken bodily from the English Act Section above referred to. The first six sub-sections are the same as those of Section 17 (1) to 17 (6), U. K. Finance Act, 1939. In sub-section (7), the definition of the expression, ordinary share capital has been taken from para 13 (d) of the (U. K.) Finance Act, 1937.

3. **Scope of Section 9** :—As the marginal note of the Section indicates, Section 9 relates to 'interconnected' companies. The word 'interconnected' points out to the fact that there should be a relation or connection between the companies. This relation or connection is created by the fact of one company holding a very large number of shares of and controlling the business of the other or others.

Thus, a company *A* may hold 90 out of 100 shares in company *B*. The two companies *A* and *B* are interconnected by shares and as *A* holds a large number of shares of *B*, *A* is the principle company, and *B* the subsidiary company.

Although the terms, 'principal company' and 'subsidiary company' have been used in Section 9, for the sake of convenience, it does not imply that the Section is applicable only to such companies *i. e.* companies properly so called. Nor is it that the Section is applicable only to companies incorporated in British India. Division of capital of the company into shares is essential to render the Section applicable. The principal company must be a resident of British India though the subsidiary company may not be.

On the lines indicated above, there may be cases where the principal company A is one, holding a major number of shares in and controlling more than one company that will be 'subsidiaries' to A. In such a case obviously there is a group of companies, consisting of the parent or the principal company and the subsidiary company or companies.

One of the principles of Excess Profits Tax is that a group of such companies, wherein the principal company holds and controls almost cent per cent of the share capital of the other company, i. e., the subsidiary company, is to be treated as one unit. Section 9 Excess Profits Tax Act is based on this principle. According to sub-section (6) of this Section where a company holds and owns nine-tenths of the shares capital of the other company, directly or through other company or companies, the former is the 'principal' or 'parent company' and the latter the 'subsidiary company'.

The requisite proportion of shares (i. e. 9/10th) of the principal company should be 'owned' by the parent or the principal company. By sub-section (8), 'ownership' means beneficial ownership.

Where the above stated relationship of principal and subsidiary company exists, the result, under sub-section (1) of Section 9 is that any rent or royalty paid by one company to another is to be disregarded.

To be more explicit, the capital of the two companies is computed on the same basis, the profits and losses of both the companies are computed by altogether disregarding the interest, annuity, rent or royalty payable and as if the debt in respect of which interest is payable did not exist, and as if the assets giving rise to royalty or rent belonged to the company paying the royalty or rent.

The principle is that the business of the subsidiary company is dealt with as if it was that of the principal

company, as if the latter was carrying it on, and the same principle is applicable in the case of several subsidiary companies.

The excess profits and deficiency of the principal and the subsidiary companies are also liable to adjustment.

4. Sub-section (1) :—Sub-section (1) of Section 9 deals with the computation of capital, profits and losses of two companies that stand in the relation of 'principal' and 'subsidiary' to each other.

So far as the computation of profits is concerned, the effect of Section 9 (1) is that interest, annuity, royalty, rents, etc., will be taken as if these were not paid.

These will not be deductible in computing the profit of the company making the payment; nor will these be computed as receipts of the company to which the payment is made. If for example, company A pays royalties to company B, both A and B being subsidiaries to C, then, for the purposes of computation of capital, the patent in respect of which the royalty is paid shall be treated as the property of A, the company paying the royalty, and not of B, receiving the same. Thus, the effect of Section 9 (1), will be, on the one hand to prevent A's profits from being reduced by the amount of royalties and also, on the other hand, to increase the amount of capital employed in A's business by the value of the asset represented by the patent. Taking conversely, the effect of Section 9 (1) will be to prevent B's profits from being increased by the amount of royalties and also to reduce the amount of the capital employed in B's business by disregarding the value of the patent, which, though in fact the property of B, is to be treated as the property of A. Similar results are to follow in the case of payment of interest or debt, covered by Section (1), (a) and (b). The following example will illustrate the working of Section 9 (1).

Suppose company A owns 93 percent of the ordinary share capital of company B. In consideration of a certain license granted by A to B, a royalty of Rs. 500 is payable to A by B in 1940. Then, company B leased its premises

purchased for Rs. 2,000 to company A at a rent of Rs. 200 per annum. A has lent Rs. 2,000 to B at 5% interest. The above amounts of royalty, rent, loan and interest are all duly shown in both the company's Account Books. For computation of capital of both the companies employed in the two businesses for Excess Profits Tax purposes, the debt of Rs. 2,000 shall be deemed to be non-existent.

The property purchased by B for Rs. 2,000 shall be deemed to be the property of A, and not of B.

In the case of both companies, the royalty, rent, loan and interest shall be left out of account in computing profits. This is the full and true sense of Section 9 (1). It is so under the English law also. In an English Case, *James Weldie & Sons Ltd., v. The Commissioners Inland Revenue*. (12 T. C. 113,117) assesses, coal merchants, practically controlled another coal company, owning £6,236 out of £10,000 of the latter's capital, besides holding certain debentures of it and being entitled to a fixed rate of commission on the sale of the company's coal. Assesses made advances to the company to help them financially. The assesses contended that these were debts due by the company while the Revenue contended that the advances were investments.

The advances were held to be capital employed in the business and it was held that, therefore, there was no decrease in the company's capital with in Section 41 (3) Finance Act, 1915 due to these advances.

The company to which advances were made was subsidiary to the assessee company. The advances were treated as capital of the principal company.

The word 'both' is important, implying the assumption that *both* companies (the payer and the payee) are within the scope of Excess Profits Tax, the natural inference being that the sub-section will not apply where any of the parties is not within the scope of Excess Profits Tax. In the absence of clear words, however, to this effect, it is rather difficult to suppose that this is to be understood.

5. Sub-section (2):—Under this sub-section, all that is required is that the principal company should be a resident of British India, while the subsidiary company need not be; it may or may not be so. The words, 'and is not a subsidiary of any other company' etc., clearly indicate that it is immaterial if the 'principal company' 'itself is a subsidiary,' provided that it is not a subsidiary of the company residing in British India. The word used here is '*resident*' and not '*ordinarily resident*'. The test of residence of a company in British India is the control of business from British India, and not its incorporation in British India [see also notes under Section 2 (8) *ante*].

Under I. T. Act, a company in '*resident*' of a place where it carries on business.¹ A company was incorporated in New Zealand, having its registered office there, but having two Boards of Directors, one in London and the other in New Zealand. The London Board exclusively controlled the Finances, the administration, major policy of the business, while accounts were also kept and dividends also were declared in London. The company was held to be residing in London.² The *ratio decidendi* of all the English cases on the point, thus, is that (1) Central management and control determines the residence of a company and (2) that a company may have more than one residence if the control is divided. The question of the residence of a company like that of the residence of a person is one of fact.

6. Sub-sections (3) & (4). Sub-section (3) deals with cases in which the relationship of principal and subsidiary existed during the whole of the chargeable accounting period of the principal company, while subsection (4) deals with cases in which that relationship existing during a part only of such period.

A subsidiary company may be so (*i.e.* subsidiary) throughout the entire chargeable accounting period or for a part of it only. In the former case, as already stated above, the business of the subsidiary company is treated as that of the principal company, if, however, the relationship existed for

(1) *De Beers Ltd. v. Howe* 5 T. C. 198.

(2) *Newzealand shipping Co. v. Thew* 8 T. C. 208.

a part of the period only, the Excess Profits of the subsidiary company are regarded as increasing the excess profits of the principal company. If the subsidiary company has excess profits but the principal company has a deficiency, the excess of the subsidiary company would diminish the principal company's deficiency. If the principal company had excess but the subsidiary company a deficiency the principal company's excess is reduced accordingly. If, however, both the companies had deficiency the total deficiency would go to the principal company.

In the computation of capital employed in the business, the assets and liabilities of the subsidiary company are to be treated as those of the principal company. The assets are to be valued as if they were acquired by the principal company, of course, for the same price at which the subsidiary company acquired the assets. Where the profits of the principal company are to be computed with reference to standard period, the profits and capital of the subsidiary company shall be added to the profits and capital of the principal company, irrespective of the fact whether the subsidiary company was or was not subsidiary of the principal company during that period. If the subsidiary company was not existing at the time when the profits of the principal company fell to be determined with reference to the standard profits, the entire amount of capital employed in the business of the subsidiary company in the chargeable accounting period will go to swell the amount of capital of the principal company in the chargeable accounting period and the standard profits of the principal company shall be adjusted accordingly.

Sub-section (4) would cover cases where the principal company acquires the share-capital of the subsidiary at a date different from the one at which one of the chargeable accounting periods of the principal company commences. In such a case, as already stated above, the standard profits of the subsidiary company have to be determined. And, the result of such a computation, whether an excess or deficiency,

would go to the principal company's account for that period. The subsidiary company's excess of profits or deficiency, whichever may be the case, shall be its separate entity and shall merge into the principal company's accounts, whether it is an excess or deficiency.

7. Sub-section (5) :—The provisions of sub-section (5) are the necessary consequence of those of sub-sections (3) and (4). An adjustment of the chargeable accounting periods of the principal and subsidiary companies would be necessary if either sub-section (3) or sub-section (4) was applicable. Where the relationship of 'principal' and 'sub-sidiary' covers the entire chargeable accounting period, an adjustment of the chargeable accounting period of the two companies may be necessary for the sake of convenience, so that the chargeable accounting periods of the one may correspond to those of the other. In a case where sub-section (4) applies, a line may be drawn in the chargeable accounting period of the principal company, at the point of time at which the relation of subsidiary and principal commenced.

The adjustment has been left in the hands of the Central Board of Revenue. In the United Kingdom, under Section 17(5), Finance Act (2) of 1939 the Commissioners are entrusted with this.

8. Sub-section (6) :—This sub-section defines and explains the term 'subsidiary company'. Where nine-tenths of the ordinary share capital of a company is held by another company, whether directly or through the other company or companies or partly directly and partly through another or others, the holding company is the principal company (or parent company) and the other company the subsidiary company. The term 'ordinary share capital' is defined in sub-section (8) *post*. The succeeding sub-section (7) lays down how the 'ordinary share capital,' held as stated in this sub-section, shall be determined.

9. Sub-section (7) :—Sub-section (7) lays down that the method of determining the amount of ordinary share capital

of one company owned or held by another is the one indicated in Schedule III. For this see notes under Schedule III *post* and the illustrations given therein.

10. Sub-section (8):—This sub-section defines 'ownership' and 'ordinary share capital,' the two terms used in sub-section (6) *ante*. 'Ownership' means 'beneficial ownership'. A trustee by is a beneficial owner; so is a guardian of a minor. Hence holding of 9/10th of a share capital of a company by a trustees or a guardian, for the benefit of their *cesti qui trust* (or beneficiaries) would mean 'owning' the share capital. 'Ordinary share capital' is defined as 'all issued share capital of the company (by whatever name called). Capital, the holders whereof are entitled to a fixed rate of dividend but who are not to participate in the profits of the company is excluded from the definition of the term 'ordinary share capital'.

In the United Kingdom law [Finance Act (2) of 1939] the words 'body corporate' appear in the corresponding Section 17 (6) instead of company. The definition of 'ordinary share capital', as given in sub-section (8), is more appropriate to the term company than to 'body corporate', which is a more general term than 'company'.

11. Sub-section (9):—This sub section was added (at a motion by an Hon'ble member) by the Legislative Assembly. The underlying intention was described thus :—

"The intention underlying this clause is that the profits for the purposes of the Excess Profits Tax Bill, of all the companies, principal as well as subsidiary, be consolidated and the profits collected on the total amount arising as profits from all this group of companies. This is only a technical point and empowering the principal company, if the money is paid by the principal company, to get their share of excess profits tax paid by the principal company from the subsidiary company.(Sardar Sant Singh).

12. Sub-section (10):—This sub-section was also added by the Assembly "I think equity really lies here. It is really on

account or this equity of the distribution of the taxes that I move this amendment". (Dr. Sir Ziauddin Ahmad).

Section 10. (1) *A person shall not for the purpose of reducing any excess profits which are or would be chargeable to excess profits tax enter into a fictitious or artificial transactions, or carry out any fictitious or artificial operation.*

Explanation.—For the purposes of this section an artificial transaction or operation includes every device of whatever nature adopted for the purpose of presenting the accounts of a business in a misleading form or manner with intent to evade or having the effect of evading any obligation imposed by this Act.

(2) *Any such transaction or operation shall be treated as null and void for the purpose of computing the excess profits tax payable under this Act.*

(3) *If the Excess Profits Tax Officer is satisfied that any person has acted in contravention of the provisions of sub-section (1), he may with the previous approval of the Inspecting Assistant Commissioner direct that such person shall pay, in addition to any excess profits tax for which he is or would, but for such transaction or operation, be liable, a penalty not exceeding the tax evaded or sought to be evaded.*

1 Previous Law:—Section 17 of the Excess Profits Duty Act, 10 of 1919, contained almost the same provisions as are contained in this Section. The proviso of sub-section (2) of Section 17 relating to criminal offence no longer exist in Section 10, though sub-section (3) of Section 10 has provided for penalty.

It may be that the case may be strained to be covered by the provisions of Section 25 *post*, in order to bring it within the pale of a criminal offence. The replacement by a penal provision of the criminal liability, however, dislocates any such idea, for two punishments on same facts, are contrary to the elementary principles of law and justice.

2. Analogous Law :— Schedule 7 Part 1 B. 9, Finance Act 2 of 1939, relates to adaptation of Income-tax principles as to computation of profits. After the passing of the Finance Act, 1915, when there was considerable controversy as to the advisability of such a duty, and considerable efforts were made by people to get out of the duty, the Finance Act, 1918 was passed Section 35 of which read as follows :—

“For the purposes of Excess Profits Duty the profits arising from the sale’—not a sale—‘at any time after the 22nd day of April, 1918, otherwise than in the ordinary course of trade of the trading stock or part of the trading stock belonging or formerly belonging to any trade or business shall be deemed to be profits arising from a trade or business, and where any such sale takes place after a trade or business has ceased, the trade or business shall be deemed to have been carried on upto and including the date on which the sale takes place, and the accounting period shall be taken to be such as the Commissioners of Inland Revenue may determine”.

The Indian Income-tax Act also contains analogous provisions in Chapter V-B (Sections 44 D. 44 E. & 44 F.)

It may as well be pointed out in this connection that, while most of the provisions of the Excess Profits Tax Act, 1940, have been copied *verbatim* from the United Kingdom, Finance Act (2) of 1939, at places the Government have chosen to adopt an entirely different line. Section 10 is one such instance. In the Legislative Assembly, there was a motion to substitute the exact words of para 9, Schedule VII, (United Kingdom) Act, (2) of 1939 for the present Section 10. “Clause 10 deals with artificial transactions, and, as it has emerged from the Select Committee, it consists of three parts: the first is that provision is made for entering into fictitious or artificial transactions or carrying out any fictitious or artificial operation. The explanation to this part explains as to what acts will be included in the term artificial transaction or operation. Then, part (2), as it stands, declares these transactions to be null and void; and part

(8) penalises further the operation of these artificial transactions. I move this amendment to do away with all these things and say that such artificial transactions or operations shall be null and void. I take this amendment from the United Kingdom Act as given in the Finance Act, 11 of 1939, in Schedule V11, in para 9,* *I have taken it verbatim from that. The United Kingdom Act only declares such transactions to be null and void.* The effect of this would be that if any artificial transaction or operation is included in the accounts, the Excess Profits Tax Officer can say "I will not have any regard for this and I will treat it as non-existent". But certainly it will be going too far to penalise the person in the manner in which it is proposed to penalise him under the Bill. Therefore, I submit that the onus lies upon the Government Members to convince us as to why they want to take additional precaution in India which has not been taken in the United Kingdom. In this connection, I may be permitted to add that the mental background of the Tax Collector in India is that of a Police Officer which has made clear in one of the standard books on evidence written by Mr. Field. While describing the difference between the mental attitude of a Police Officer and a Magistrate, Mr. Field said that the reasons why a Police Officer, whatever high post he may hold, is not regarded as reliable witness in a Court of law are that the Police Officer starts with the presumption that everybody is guilty. The Magistrate, on the contrary, starts with the presumption that everybody is innocent unless he is proved guilty. The mental attitude of the Income tax Officer and the Excess Profits Tax Officer is that of the Police-men. Why do you start with the presumption that every man is dishonest unless he is proved to be so? You should regard him as honest until he is proved to the contrary. This is the mental attitude which I would recommend the Honourable the Finance Member to bring to bear upon this matter. Therefore, I commend this amendment for acceptance of the House. (S. Sant Singh)

"The motion was opposed :

"I oppose this amendment, and I would like to start

* The italics are ours.

where the Honourable Member has just finished. He said that the attitude of Income-tax Officers is to treat people as dishonest, and that he thought that their attitude should be to treat them as honest until they are found out* Let me say at once that I agree entirely with the Honourable Member's attitude and it is an attitude which I have been trying to instil into officers in this country that they should treat assesseees as honest and they should treat them fairly and courteously.".....In all these matters, I think the assumption should be that the assessee is honest but when we look into his accounts if we find that he is not honest, then we will treat him accordingly, and it is a fact, I think, that the fairer the officer treats honest assesseees the better case he has for dealing severely with the other assesseees. We are not concerned with those who are honest here or those who are not entering into such transactions. The clause, as it appears at present, gives what I might call a sporting chance to a man who wants to dodge excess profits at something like a 50 : 50 chances. If he is found out, he pays Government twice, if not, he does not pay once. That is, if he is not found out, than he avoids all the tax; if we find him out, then the effect of this amendment, as drafted, will be we shall be leaving all the chances on his side. I suggest that that is neither fair nor equitable.

Now, reference has been made to the position in India in the 1919 Act and also to the position in the United Kingdom. In so far as the 1919 Act is concerned, that Act, which was only in operation for one year, was full of defects. No doubt it will have been amended if it had been in existence, longer, and there are very few provision in the 1919 Act which are still appropriate to the conditions in India in 1940."....." If the Excess Profits Tax Officer attempts to over-assess, what will happen is, the assessee will have a right of appeal. May I remind the Honourable Member that, under the Income-tax, Act, there are full time Inspecting Assistant Commissioners, and the Inspecting Assistant Commissioner will severely reprimand the Excess Profits Tax Officer, and his penalty may be severe—he may actually lose his job.

* *Sic.*

The other matter referred to was the position in the United Kingdom. There clearly the position is that no penalty is shown in the Finance Act of 1939. There the position is, if a man enters into transactions of this nature or in any way defrauds the revenue, the only remedy is penal action. That course is not easy in the United Kingdom. I think it is still more difficult in India, and I think, in a monetary matter of this kind, the provision we have at present is more satisfactory, we say he should pay the tax and also something more by way of penalty, which is a simple process, and I think it is a simple and equitable process and better than attempting to enter into a long and difficult prosecution which may end in imprisonment. I am sure that those who would enter into transactions of this kind would rather pay the tax than go to prison" (*Mr. S. P. Chambers*) "No prosecution for an offence against this Act shall be instituted in respect of the same facts as those in respect of which a penalty has been imposed. It will not be an offence under this Act, but it will be an offence under the Indian Penal Code. That is not excluded at all in this Section. In terms of the wording of Section 25, what is excluded is any criminal action against this Act and for having violated the provisions of the Act only.

Now, it not only amounts to a violation of the provision of this Act, but it may also amount to a violation of the provisions of any other Act and a prosecution under that Act is left open. Therefore, if the existence of a penal remedy is considered as a sufficient ground for not making a provision for recovering an additional penalty in this form in the United Kingdom, that ground holds good here also. Either we must provide no prosecution under any criminal law arising out of the facts which amount to violation of any thing under the Act—or we must do away with the clause of penalty that exists here. That requires to be clarified (*Mr. M. S. Aney*).

On an assurance from the Government that steps shall be taken to ensure that this intention shall be carried out, namely, no prosecution will lie on the same fact which a penalty has been imposed on the assessee under this Section, the motion was withdrawn.

3. **Scope of Section 10** :—Section 10 contains a very simple and rudimentary principle of law, that artificial and *benami* transactions are not recognized. This general principle of law, of almost universal application, has been given recognition to in the Excess Profits Tax Act also, naturally enough, for, due to reluctance of people to submit to a taxation—much less to an additional taxation like the Excess Profits Tax—it is not unnatural to suppose that fictitious transactions having the effect of reducing profits will be resorted to. Section 10 contains provisions in order to counteract these transactions.

Sub-section (1) is in terms mandatory *per se*, as the words, 'shall not' indicate. It means that such transactions shall on no account be countenanced. The words of the explanation to sub-section (1) are so comprehensive and wide that even a presentation of "accounts in a misleading form" is included in the 'duress'. Such transactions are by sub-section (2) to be treated as if not made, and *void ab initio*.

Any contravention of the above is, by sub-section (3), met by a penalty, which may be equal to the Excess Profits Tax payable.

As already stated above, the provisions for a criminal prosecution no longer exist. Apparently, they have been replaced by the provision as to penalty contained in this sub-section.

4. **Subsection 1** :—It is not only fictitious or *benami* transactions but even fictitious or artificial operations that the Section embraces. The term 'operation' is very wide. Presenting the accounts of a business in a misleading form is one of these operations specifically indicated by the Explanation to sub-section (1). In fact, these operations may take more forms than one. In an English case, *Neville Reid & Company, Ltd. v. The Commissioners Inland Revenue*¹ there was the question of the date of sale, whether it was before or after the 22nd April, 1918. The assessee contended that the date of agreement to sell may be taken to be the date of sale. If that contention was accepted, which was not done, profits would have been avoided.

1. 12 T. C. 545 (573).

3. Fictitious or artificial operation :—Section 44D, 44E and 44F, Income Tax Act, 1922, (amended 1939) in the newly added chapter V-B, illustrate operation that may be artificial or fictitious.

In introducing the Bill containing the above Sections it was observed :—

“One of the methods of avoiding the payment of tax without breaking the law is to transfer the assets from which the income arises to a company which is resident outside British India, and then to receive payments from that company in a form and in such circumstances that the amounts received from the company are never in fact repayable or repaid to it. The effect of these arrangements is that the real owner of the assets receives the income therefrom indirectly and in a capital form. These receipts cannot, as the law stands at present, be treated as income in the hands of the recipient, nor, since the company is a non-resident company, can it be subjected to the provisions of Section 23A which deals with a company which, to enable its proprietor to avoid super-tax, fails to distribute its income.

It is the object of the present clause to prevent the loss of tax through such devices. It will be seen that the first effect of a device of this kind is that the income which in reality is the income of a person liable to pay income-tax or both becomes the income of non-resident person (which term, of course, includes a company) which is either not liable or liable for only a smaller amount of tax. By means of the loans the real proprietor continues to have power to enjoy the income from the asset.

It is difficult, if not impossible, to draft a *simple* preventive clause which a skilled lawyer cannot evade. The clause has, therefore, been drafted in wide terms and follows the wording of Section 18 of the United Kingdom Finance Act, 1936. Its terms are very comprehensive, and the net effect intended is that wherever income, which really belongs to a person liable to income-tax, becomes by means of an artificial set of transactions the income of somebody liable to pay less tax or no tax at all,

such income can, for tax purposes, be treated as the income of the person to whom it really belongs. (*Bill*)

The point received the consideration of the Enquiry Committee also, who observed :—

“The outstanding instance in British India of this type of case is one recently the subject of a Privy Council decision. Briefly, the result of a series of operations in that case is the creation of a liability on the part of a British India company to pay a large sum of interest to a company resident in China. So far as Income-tax is concerned, the position should be met by our suggestions in Chapters VIII and X that tax on such interest be paid at source, but given accumulation of its income by the foreign company and no declaration of dividends, super-tax avoided, Section 23A having no application to a non-resident company. The only means of dealing with such a case would be, in our opinion, legislation on the lines of Section 18 of the United Kingdom Finance Act, 1936, which moreover is designed to cover a wide variety of other schemes for avoidance of tax.”

6. Explanation:—The expression ‘any obligation imposed by this Act’ must refer ultimately to the imposition of the Excess Profits Tax under the Act.

7. Sub-section (2):—By sub-section (2) any artificial or fictitious transaction or operation shall be treated as *null and void, ab initio*, for the purpose of computing Excess Profits Tax.

8. Sub-section (3):—This sub-section provides for penalty, which shall be payable in addition to and over and above Excess Profits Tax payable and may be equal in amount to the tax sought to be evaded or avoided.

Section 11. (1) *The Central Government may by notification in the official Gazette make provision for the granting of relief in cases where both excess profits tax under this Act and excess profits tax under any law in force in the United Kingdom, in any Indian State, or in any other part of His Majesty's Dominions have been paid upon the profits of any business if it appears to the*

Relief in respect of double excess profits taxation

Central Government that the laws of the United Kingdom or of that Indian State or of that other part of his Majesty's Dominions provide for corresponding relief in respect of excess profits tax charged on profits both in the United Kingdom or in that State or in that part and in British India :

Provided that where under Section 19 of the Finance, (No. 2) Act, 1939, national defence contribution has been paid in the United Kingdom in lieu of excess profits tax, that portion of the national defence contribution so paid which is equal to the excess profits tax which would otherwise have been payable shall, for the purposes of this sub-section, be deemed to be excess profits tax paid in the United Kingdom.

(2) *If any person, who has paid excess profits tax under this Act for any chargeable accounting period in respect of profits arising outside India in a country the laws of which do not provide for any relief in respect of excess profits tax, charged in British India, proves that he has paid excess profits tax under the laws of the said country in respect of the same profits, he shall be entitled to the deduction from the excess profits tax payable in British India of a sum equal to one-half thereof or to one-half of the excess profits tax payable in the said country, whichever is the less.*

1. **Previous Law** :—No provision for relief in respect of double excess profits taxation existed in the Excess Profits Tax Act, 1919.

2. **Analogous Law** :—(1) *English Law*:—Schedule 7 Part 1 B. 8 and 12 contains provisions similar to those, relating to double taxation relief. (2) *Indian Law* Section 49 Income Tax Act 1922.

3. **Scope of Section 11**:—Section 11 deals with the subject of relief to be granted in cases where Excess Profits Tax has been levied on any person both in India, and in the United Kingdom, in any Indian State or in any other part of His Majesty's Dominions. The provision is based on the rudimentary principle of Income Tax law that double taxation is to be avoided.

Section 14 and 2nd provision to Section 55 of the Indian Income tax Act, 1922 (amended 1939) are based on the same principle. Provisions for relief in cases mentioned in the Section are to be based on a notification by the Central Government, to be published in the official Gazette. The grant of relief under the Section is to be 'reciprocal,' that is to say, relief for double taxation under this Section will be given only on the condition that a similar corresponding relief allowed by the laws of the United Kingdom, the Indian State or the Dominion concerned. Reciprocal arrangement for relief is a necessary condition for a relief like the one provided for in this Section.

With regard to the relief in respect of United Kingdom Income-tax, it has been observed :—"The position of those persons who are called upon to pay tax in two or more different countries on the same source of income is one that gives a rise to much injustice, but by no means easy to alleviate".

Where profits are taxed both in a foreign country and in the United Kingdom the only relief given in respect of the United Kingdom tax is that which permits the amount of tax suffered in the other country to be deducted from the amount on which the United Kingdom assessment is computed.

It may be a point worthy of note in this connection that income-tax relief under Section 49 I. T. Act, 1922 proceeds and is based upon a comparison of the *rate* of tax in India with the rate of tax in the United Kingdom and not on the comparative amount of tax paid in either country.

That is to say, what is compared is the rate of the Indian tax paid by the claimant for the Indian year of assessment corresponding to the United Kingdom year of assessment in respect of the part of the claimant's income liable to United Kingdom tax and not the particular amount of such part of his income liable to United Kingdom income tax as is charged to Indian income-tax".

In an English case, *Rolls Royce v. Scout*,¹ it was held that having regard to the different modes of assessment

1. 10 T. C. 59 (78).

in India and in England, the profits chargeable in the two countries would seldom be identical and that as a consequence one should look to the source than to the exact amount.

Under the analogous English Law (Schedule 7 part I, Para 12) the position is the same. (See Part III.)

There is abundant case-law, in particular in the United Kingdom, on the principle of double taxation to be avoided,

It is against the principle of the scheme of taxation that there should be double taxation ¹. Double taxation has not been regarded as either the purpose or the right effect of taxing Act ², and it is contrary to the provision of the Income-tax Act. ³ The Income-tax Act no-where authorize the Crown to take Income-tax twice over in respect of the same source or for the same period of time ⁴. You cannot so interpret a taxing Act as to tax the subject twice over to the same tax ⁵.

The difficulty, however, of finding support for the rule against double taxation has been felt in the United Kingdom ⁶.

The whole and the main principle of the provisions in Section 11 is that there is to be no double taxation in the matter of Excess Profits Tax as in the case of Income-tax. And, naturally, the same principles as are applicable in the matter of Income tax Act (under Section 49) should apply in the case of Excess Profits Tax also.

As has been pointed out above, with reference to a case under the English Law (*Rolls Royce v. Stout*) in the matter of double taxation relief in United Kingdom and India, the source rather than the exact amount has to be looked to in *Assam Ry. & Trading Co., Ltd. v. Commissioner Income Tax*. ⁷ However, it

1. *Schulze v. S. W. Bensted* 7 T.C. 80 (85)

2. 9 T.C. 620.

3. 8 T.C. 640.

4. 8 T.C. 513.

5. 5 T.C. 407.

6. 8 T.C. 820.

7. 18. T.C 509 (1933).

was held that the above observation was to be read with reference to special facts of the case.

The main point in connection with the question in hand is that there should be reciprocity in the matter. Just as there is a reciprocity in the matter of Income-tax, so the Rules under the Excess Profits Tax Act allow such a reciprocity.

Indian State or in any other part of His Majesty's dominions:—Sections 49-A (1) and (2) added to the Income-Tax Act, 1922 by the amending Act, 1939, has now provided for relief in case of tax levied in Indian States or in any Dominion. Before the enactment, this relief was provided for by notification under Section 60 Income-tax Act. The principle, being recognised under the Income-tax Act, has been given recognition in the Excess Profits Tax Act also. The term "corresponding relief" indicates reciprocity which is the main and essential point of the rule of law contained in this Section.

4. Sub-section 1:—Excess Profits Tax under any law in force in the United Kingdom :—Excess Profits Tax under the United Kingdom Finance Act (2) of 1939, is levied under the provisions of Part III Section 12 *et seq.* The analogous provisions as to double taxation relief are contained in Schedule 7. Part 1 Section 12. The effect of this last mentioned rule of law is that, in the case of trade or business to which the Excess Profits Tax Act applies, the exemption granted in respect of income-tax is extended to Excess Profits Tax also and this on the basis of reciprocity. The condition is that the relief granted by the other country also extends to Excess Profits Tax and is not limited to Income-tax only.

5. In any Indian State :—Double taxation relief will also be available in case of Excess Profits Tax, if levied by any Indian State, provided that the State also, by its legislation, relating to Excess Profits Tax has made provision for double taxation relief. With regard to this the Select Committee observed :—"We desire to record our view that should an excess profits tax be imposed in any Indian State, Government should make every effort to establish reciprocity in regard to relief with that State."

6. Any other part of His Majesty's Dominions :—Double taxation relief is to be allowed in respect of any Excess Profits Tax payable in any Dominion. The analogous English Law is also the same *vide* R. 5 Schedule 7 part 1 (Part III, United Kingdom Finance Act, 1939).

7. Provision :—National Defence contribution is taken to be equal to Excess Profits Tax for purposes of double taxation relief. The proviso was added by the Select Committee.

8. Sub-section (2) :—Sub-section (2) was added by the Select Committee. "We have inserted an additional sub-clause. (now sub-clause 2) :—on the lines of Section 49D of the Indian Income-tax Act, 1922, to provide for the giving of relief in cases where no corresponding relief exists in other countries".

There was a motion in the Assembly to replace the words 'one half thereof or one half' occurring at the end of sub-section (2), by the words 'the full amount thereof or the full amount.' It was observed :—"The object of this amendment is that full relief to the extent of double taxation should be given to those merchants who are having their business in such foreign countries where their Governments have legislated for Excess Profits Tax. They are liable to Excess Profits Tax in those countries of origin and it is very fair that they should be given relief to the extent of the full amount that they have to pay in those countries. The Bill provides for rebate or relief of only half of the amount so paid as tax in those foreign countries or in India whichever is less. I think equity demands that they should have full relief. Otherwise double taxation remains at least to the extent of half that they are compelled to pay under the present Bill as it is. Already, under the income-tax, after the introduction of the world income system of taxation, they have to pay full one and again half income towards income-tax. I think risk of trade in foreign countries has increased and this is not the time, Sir, when instead of giving them any encouragement such a stringent legislation should be made as would rather involve them in further difficulties. I think risk of trade in foreign countries has increased with war

conditions and there are greater amounts of risk for them now than in usual condition and security of relief must be provided."

The motion was opposed and was withdrawn. In opposition, reference was made to another proposed amendment to be made in the succeeding Section 12 and it was observed :—"The effect of that amendment is to allow, as a deduction for income-tax purposes, the whole of the foreign tax paid in respect of profits arising in a foreign country whether that foreign country is part of the British Empire or not. That amendment will be accepted by Government if it is put, but this amendment to clause 11 would place us in rather an embarrassing position. The normal process of double taxation relief is for one country to grant part of the relief and for the other to grant further relief, so that in total the tax paid does not exceed the greater of the two amounts. Now, if the amendment were carried, the effect would be that India, without any effort on the part of the other countries, would have to allow the whole relief for the excess profits tax payable...." "The question about this is that this would involve no effort on the part of the other country to enter into reciprocal arrangements. The full burden of the whole of the foreign excess profits tax would fall on the Indian Exchequer. That goes further than we could allow, because, under that amendment, there will be no inducement to any country, either an Empire country or any other country, to enter into any arrangement with India for reciprocal relief. We would have to allow the whole of the relief, and the whole burden would fall on the Indian exchequer. That is the difficulty. We have sympathy with the Honourable Member, but I think that by allowing one half here and allowing the whole tax paid, whether Indian or foreign, as a deduction for income tax purposes in clause 12, we have gone as far as we can reasonably go." (*Mr. S. P. Chambers*) "In view of the very good explanation given by Mr. Chambers, I wish to withdraw the amendment. I appreciate the point that it will give other countries no chance of making a settlement with us" (*Mr. Muhammad Nauman*).

Section 12. (1) *The amount of the excess profits tax payable in respect of a business for any chargeable accounting period diminished by any amount allowable by way of relief under the provisions of Section 11, shall, in computing for the purposes of income-tax or super-tax the profits and gains of that business, be allowed to be deducted as an expense incurred in that period.*

Allowance
of excess
profits tax
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(2) *There shall also be so deducted the amount of any excess profits tax payable under any law in force in a country outside British India on the profits of the business in respect of any chargeable accounting period to the extent that such profits arose in the said country, after diminishing such amount by any amount which is allowable by way of relief by repayment, set off or otherwise under any law in the country where the tax is payable providing for the granting of relief in that country where excess profits tax has also been charged in British India :*

Provided that where, under the provisions of this Act relating to deficiencies of profits or under any corresponding law in force in the said country without British India, relief is given by way of repayment from excess profits tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed under sub-section (1) or sub-section (2) shall not be altered, but the amount repayable shall be taken into account in computing the profits and gains of the business for the purposes of income-tax as if it were a profit of the business accruing in the chargeable accounting period in which the deficiency of profits occurs.

1. Previous Law :—Section 20 Excess Profits Duty Act, 1919 contained similar provisions.

2. Analogous Law:—Section 18 (1) and Proviso of the English Finance Act (2) of 1939 contains analogous provisions. In fact, this Section of the Indian Excess Profits Tax Act is almost a true copy of the English Act.

3. Scope of Section 12:—Section 12, in effect, lays down that the Excess Profits tax payable under this Act shall

be an allowable deduction from a person's income for Income-tax Act purposes. For instances, if, say, a sum of Rs. 1,000 is payable to the Revenue, in respect of any chargeable accounting period this sum will be deductible from the assessable income of the person for the same period, being deemed to be an expense incurred during that period. It is noticeable in particular that the deduction is available *for*, i.e. in respect of the period *for* which the Excess Profits Tax is paid and not in respect of the period *in* which it is paid in fact. The amount of Excess Profits Tax deductible shall be calculated after making allowance for any relief given under Section 11 *ante*.

Any deficiency relief, under Section 7 *ante* given by way of repayment, in respect of Excess Profits Tax chargeable for a previous chargeable accounting period would not affect the amount to be deducted for Income-tax purpose. On the other hand the amount repaid shall, for Income-tax purposes be treated as a profit of the chargeable accounting period in which the deficiency occurred. This is the sense of the provisions contained in the proviso to Section 12. This covers, according to the proviso, the amount of deduction allowed both under sub-section (1) and sub-section (2) of this Section. Sub-section (2) relate to Excess Profits Tax chargeable in respect of any accounting period under the law of the United Kingdom, or any Indian State or any Dominions, where the profits in respect of which the tax is chargeable arose in the United Kingdom or Indian State or in the Dominion. The above amount of Excess Profits Tax is to be deducted after deducting therefrom any relief granted in respect thereof (under Section 11) by way of repayment or otherwise under the law of the country allowing the granting of relief.

The sum and substance of the Section is that any Excess Profits Tax paid shall be deducted from profits for computation of the latter for Income tax purpose. The amount of this Excess Profits Tax is to be (1) under sub-section (1), the amount of Excess Profits Tax payable, less any amount allowed by way of relief under Section 11 of the Act.

Deficiency of profits allowed under Section 7 shall not affect the said amount. (2) Then, under sub-section (2)

deduction shall also be allowed in respect of the amount of any Excess Profits Tax paid in respect of any profit that might have accrued in the United Kingdom, in any Indian State or any dominion, less the relief allowed in respect of such Excess Profits Tax. That is to say, Excess Profits Tax payable in respect of any business in British India, *plus* such tax payable in respect of any business in United Kingdom, Indian State or any dominion, less relief allowed under Section 11 (but not affected by any deficiency allowed under Section 7) shall form a valid deduction from taxable income for Income-tax purposes.

It may be pointed out in this connection that under Section 27 (4) of the United Kingdom Finance Act 1920, no deduction is to be allowed in respect of income-tax paid in a Dominion. Apparently, the rule has not been made applicable to Excess Profits Tax* and income from Dominion has to be included for computation of taxable income, after deducting Excess Profits Tax payable, (*i.e.* paid), only the net amount after such deduction being thus taken into account for Income-tax purposes. Following the line of Section 18, Finance Act, 1939, according to Section 12, Excess Profits Tax Act, 1940, Excess Profits Tax has been made deductible in computing profits for Income-tax purposes. And, the deduction is treated as an expense incurred in that (*i. e.* chargeable accounting period).

For the purposes of income-tax, a considerable number of 'conventions' (as they are called) or arrangement for reciprocal relief exist already between the United Kingdom and other countries in order to afford relief in case of certain businesses (*e. g.* shipping, air-transport and certain agencies). According to these arrangements, relief is allowed from double taxation (such as is mentioned in Excess Profits Tax Act Section 11)

Such-Section (2) relates to similar arrangements and relief in respect of Excess Profits Tax. Excess Profits Tax payable in respect of business done in United Kingdom,

* Under Rule 5 Part 1 Schedule 7 United Kingdom Finance Act (2) of 1939. Section 27 (4). Finance Act 1920, disallowing deduction on account of the payment of Dominion income tax, does not apply to E. P. Tax.

Indian States or Dominions is to be allowed as deduction, minus the relief to be afforded under similar arrangements with other countries in respect of Excess Profits Tax payable. Rule 4 (1) of the Rules applicable to Cases I and II, Schedule D, English Income-tax Act, 1918 is also to the same effect and based on the same principle. It enacts that:—"where any person has paid excess profits duty, the amount so paid shall be allowed as a deduction in computing the profits or gains of the year which included the end of the accounting period in respect of which the excess profits duty has been paid; but where any person has received repayment of any amount previously paid by him by way of excess profits duty, the amount repaid shall be treated as profit for the year in which the repayment is received."

Section 35 (1) Finance Act 2 of 1915, relating to Excess Profits Duty was the same. Repayments of Excess Profits Duty have, accordingly been treated as profits assessable in more than one English Case* The Rule (R 4) consists of two parts. By the earlier part it is provided that where anybody has paid Excess Profits Duty the amount so paid is an allowable deduction' in computing the profits or gains of the year which 'included the end of the accounting period'. The second part begins with a 'but', and is in the following terms:—"but where any person has received repayment of any amount previously paid by him by way of excess profits duty, the amount repaid shall be treated as profits for the year in which the repayment is received."

4. Sub-section (1) (a) "*payable* :—The term '*payable*' would include '*paid*'.

* *Eglington Silica Brick Co., Ltd. v. (In Liquidation) v. Marrian* 9 T. C. 92 (98,100).

Hill v. Mathews 10 T. C. 25 A. & W. *Nesbit Ltd. (In Liquidation) v. Mitchell* 11 T. C. 311.

Herkes Trustees v. Commissioner Inland Revenue 11 T. C. 523.

Olive & Parlington Ltd. v. Rose (1929) 14 T. C. 701;

Tarfant v. Roberts (1930) 15 T. C. 754.

- (b) *Business*.—‘Business’ would be the business to which Excess Profits Tax Act applies.
 - (c) *Allowable*.—The word, ‘allowed’ was replaced by ‘allowable’, by the Select Committee.
 - (d) *Or Supertax*.—These words were added by the Select Committee.
 - (e) *That period*.—The term ‘that’ would refer to chargeable accounting period.
- 5. Sub-section (2).** (a) *So deducted*.—The term ‘so deducted’ means ‘deducted as an expense incurred in that period’.
- (b) *To the extent that such profits arose*.—Those words, coupled with the preceding words, ‘profits of the business’ refer to business carried on in the United Kingdom or the Indian State or any other part of His Majesty’s dominion, the profits of which are, according to the law of that place, assessable to Excess Profits Tax.
 - (c) *Is allowable*.—These words were changed (from allowed) by the Select Committee.
 - (d) *Providing for granting relief*. This relief is the same ‘double taxation’ relief as is allowed in Section 11 in respect of the profits of business carried on in British India.
- 6. Proviso**.—(a) As already stated under Scope above any relief allowed in respect of deficiency of profits, such as is allowed under Section 7 of the Act, or such as may be allowable under the corresponding or similar law of United Kingdom, Indian State or Dominion shall not affect the amount to be deducted; in fact, it would go to add to the income or profits taxable.
- (b) *Corresponding law*.—The expression ‘corresponding law’ would mean the law relating to deficiencies of profits similar to that contained in Section 7 of the Act.

Section 13. (1) *The Excess Profits Tax Officer may, for the purposes of this Act, require any person whom he believes to be engaged in any business to which this Act applies, or to have been so engaged during any chargeable accounting period, or to be otherwise liable to to pay excess profits tax, to furnish within such period, not being less than sixty days from the date of the service of the notice, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) with respect to any chargeable accounting period specified in the notice the profits of the business and the standard profits of the business as computed in accordance with the provision of Section 6 or the amount of deficiency available for relief under Section 7 :*

Provided that the Excess Profits Tax Officer may, in his discretion, extended the date for the delivery of the return.

(2) *The Excess Profits Tax Officer may serve on any person, upon whom a notice has been served under sub-section (1), a notice requiring him on a date to be therein specified to produce, or cause to be produced, such accounts or documents as the Excess Profits Tax Officer may require and may from time to time serve further notices in like manner requiring the production of such further accounts or documents or other evidence as he may require :*

Provided that the Excess Profits Tax Officer shall not require the production of any accounts relating to a period prior to the 'previous year' as determined under Section 2 of of the Indian Income-tax Act, 1922, for the purpose of the income-tax assessment for the year ending on the 31st day of March, 1937.

1. Previous Law:—Section 11 Excess Profits Duty Act 10 of 1919.

2. Analogous Law:—(a) *Indian Law:*—The provisions of Section 13 correspond to those of Section 22, Indian Income Tax Act, 1922.

- (b) Rules 1 and 2, Fifth Schedule, Finance Act, 1937 (supplementary provisions) containing provisions relating to National Defence Contribution, which have been made applicable in United Kingdom to E. P. Tax, contain provisions as to notice for making of return to be issued by the Surveyor of Taxes.

3. **Scope of Section 13:**—It may be stated at the outset that as the machinery of assessment to excess Profits tax starts with Section 13 and the succeeding Section 14 relates to assessment proper, the provisions of the two Sections being intimately connected had better be read together. Section 13 provides for the furnishing of a return of the profits and the standard profits. Discretion is given to the Excess Profits Tax Officer to issue notice, calling upon any person whom he believes to be engaged in any business to which the Excess Profits Tax Act is applicable, or whom he considers liable to pay Excess Profits Tax, to furnish a return of profits and standard profits. The issue of this notice for assessment to Excess Profits Tax is discretionary. The time prescribed is 60 days. This was originally fixed at thirty days, in the Bill as introduced in the Assembly, but was raised to sixty days by the Select Committee. The date for delivery of the above return may, in the discretion of the Excess Profits Tax Officer, be extended.

A further notice under sub-section (2) of the Section may also be served, calling on the person served with notice to produce or cause to be produced, such accounts or documents as the Excess Profits Tax Officer assessing office may require. More than one such notices may issue for production of further accounts or documents of other evidence as may be required by the Excess Profits Tax Assessing Officer. Notice under sub-section (2) of Section 13 correspond to Section 22(4) of the Income-tax Act 1922.

Under the Income-tax Act, Section 22, (amended 1939) a general notice by publication in the press is mandatory, whereupon follow 'compulsory returns' of income. This provision does not find place in this Section of the E. P. Tax Act.

4. Sub-section (1):—The provisions of Section 13 (1) are similar to those of Section 22 (2) Income Tax Act, 1922. The proviso to the latter Section regarding extension of time for delivery of returns is also the same as the proviso to the present Section 13.

- (a) **May.....require :**—The Excess Profits Tax Officer has the discretion to issue notice—'Require' means call upon, by notice.
- (b) **For the purpose of this Act :**—*i.e.* for the purpose of assessment to Excess Profits Tax
- (c) **Any business to which this Act applies :**—By virtue of Section 5 *ante*, the Act applies to every business, of which the profit is chargeable to income-tax under Section 4 Income-tax Act.
- (d) **To be otherwise liable :**—These general and comprehensive words are intended to rope in all possible cases that may be covered by the provisions of the Act and in respect of which Excess Profits may be payable.
- (e) **Not being less than sixty days :**—In the original Bill the period was thirty days but the Select Committee raised it to sixty days. This time is to run from date of service of notice.

"The same law as has been applied as the point to Income-tax Cases must be applicable under this Section also". Notice to assessee under Section 22 (2) to file a return within 29 days was held invalid in *Kanji Mal Kalyan Mal v. Commissioner Income Tax U. P.*¹. Notice under Section 22 (2) served on the assessee on 31st August 1931, demanding a return of income on or before the 26th September 1931 or within 30 days of receipt, was held as not illegal in *Jamnadhar Potdar and Co. v. Commissioner Income-tax Punjab*².

1. 1930 All. 209, 1930 A. L. J. 78 ; 3 I. T. C. 451.

2. 3 I. T. C. 191 ; 1934 Lah. 201 ; 36 P. L. R. 480.

(f) **Prescribed form** :—The form is prescribed by the Rules. Under the United Kingdom law also, returns have to be made in a prescribed form. Notice to make the return is given by the Inspector, and the return is made to him. Notice to make a return may be given to a personal representative, and to a liquidator. To a partnership the notice may be given in the firm's name; and in the case of a non-resident, the notice can be given to his agent, manager or director.

Returns have to be made within a month from the date of the notice. The duty to make the return of a partnership falls upon the precedent acting partner, who for this purpose is the same person as he who is so described in Rule 10 (2) of the Rules of Cases 1 and 11 of Schedule D. If no partner is resident in the United Kingdom the firm's agent, manager or director is liable to make the return.

(g) **Verified in the prescribed manner** :—Verification is essential on the return. The form thereof is prescribed by the rules under the Act.

An Income-tax return is not a public document and, therefore, no one has a right to inspect or to receive a copy of it. A return not bearing the signature, nor the verification by the assessee is no proper return.¹ An issue of notice under Section 23 (2) is not necessary in such a case.² Similarly, a return though signed, but not filled in and left blank (including the total column) sent with an accompanying letter that there was no business during the year is no return.³ A return not complying with the rules for filling it in, containing an entry on the margin as to loss of certain item in the preceding year and stating that the *khata's* (ledgers) not being ready, the entries in the return were merely based on surmise, is no return either.⁴ Returns filed before the various Income-tax Officers of the branches of the places of assessee's business where no return is filed before the Income-tax Officer of the principal place of

(1) *Mathura Dass Chunni Lall v. Commissioner, I. T., U. P. & C. P.* 7 I.T.O. 84; *Behari Lall Chatterji v. Commissioner I.T., C.P. & U.P.* 1934 All. 190; 7 I.T.C. 123; 1934 A.L.J. 47; 8 A.W.R. 290.

(2) *Behari Lall Chatterji* 7 I.T.C. 123.

(3) *Ratan Chand Duni Chand v. The Commissioner I. T., Punjab* 9 L. 188; 1923 Lah. 944; 8 I.T.C. 69.

(4) *Mohan Lal Hardeo Dass v. Commissioner I. T., B. & O.* 5 I. T. C. 127.

business, are not enough and the case is one of no-return, justifying an assessment under Section 23 (4) by the Income-tax Officer of the principal place of business. ¹ *P. K. N. P. R. Chettyar Firm v. The Commissioner I. T. Burma* ² was also a case wherein the return filed in response to the notice under Section 22 (2) did not comply with the provisions of Rule 19 of the rules made under the Act and assessment under Section 23 (4) was justified. A deliberate false entry and account in the first return is not condoned by a correct entry in a subsequent return and prosecution can be based on the first return (both under Section 52, of the Act and Section 177 I. P. C.) as the offence is complete the very day the first return is put in. ³ A letter with a statement in Hindi of assessee's income and the form sent blank with it is a return. ⁴ Where, however, the return entries in certain columns including the total columns contained the word 'about' with the figures entered therein the return not showing period to which the return related and the verification space was also left blank it was held that this was no return, ⁵ A return signed and verified by an assessee's *Mukhtyar-i-Am* is not valid return. ⁶ Section 24-B, of course, now applies to a case where a person served with a notice under Section 22 (2) dies before filing a return. ⁷ Where return is not furnished in due time, whether it be a statutory return which companies are required to furnish by the 15th day of June under Section 22 (1), or whether it be the return which other persons are required to furnish under Section 22 (2) on receipt of a notice from the Income-tax Officer calling upon them to do so, the person failing to make the return is not only liable to be prosecuted under Section

(1) *Ibid.*

(2) 8 R. 209: 1930 Rang. 78 (F. P.) 4 I. T. C. 340 (See also *A. R. A. N. Chettyar firm v. Commissioner I. T., Burma* 6 R. 21: 1928 Rang. 108 (F. R. 2 I. T. C. 447))

(3) *Ganga Sagar (Seth) v. Emperor* 1929A: 319: 1930 A. L. J. 26: 31 C.R.L.J. 88: 4 I.T.C. 97.

(4) *Ibid.*

(5) *Lal Mohd. Sardar Mohd. v. Commissioner I. Tax. Mad.* 7 I. T.C. 347: 1935 Lab. 358: 1934 I.T.R. 358.

(6) *S. Mohd. Mehdi v. Commissioner I.T., U. P. and C.P.* 3 I.T.C. 211: 1935 Oudh 305: 1935 O.W.N. 490: 1935 I.T.R. 202.

(7) *Dyabaha Nasserwanji Mehta v. Commissioner I. T., Bombay* 7 I.T.C. 452: 1935 Ram. 167

51 (e) but no appeal* lies under the proviso to Section 30 (1) of the Act against any assessment made by the Income-tax Officer upon the company or other person failing to make a return. In the case of a registered firm, the Income-tax Officer may also cancel its registration but not until 14 days have elapsed from the issue of a notice by the Income-tax Officer to the firm intimating his intention to do so."¹

The above case law under Income-tax Act must, on principle, be applicable to cases under the Excess Profits Tax Act also.

(h) **Profits of the business** :—This means the total amount of the profits of the business in question.

(i) **Standard Profits** :—Mention, after determination, of the profits in accordance with the rules as laid down in the first Schedule to the Act and of the standard profits as determined under Section 6 of the Act, in the return to be furnished is necessary. For, it is only after a comparison of the total profits with the standard profits that 'excess profits' chargeable can be determined. 'Deficiency' is to be stated in the return if there are no excess profits chargeable. There will either be 'excess' or a 'deficiency' as compared with standard profits. Either of these, as the case may be, has to be mentioned in the return to be furnished.

(j) **Proviso** :—The proviso contains a discretionary provision of law based on equity and justice, according to which time for furnishing a return may be extended by the assessing Officer for special cause shown.

2 Sub-section (2) :—The provision of this sub-section, as already stated above under 'Analogous law', are the same as those of sub-section (4), Section 22, Income Tax Act, 1922. Under the latter Section, Income-tax Officer is empowered to call upon any person liable to make a return to produce such accounts or documents as he may require. It does not, however, empower to ask the assesses to prepare

*This is no longer a good law; see notes under S. 28 *supra*
 (1) Para 86 (i) I. T. M. (See also para 86 (ii) I. T. M., cited under S. 22 *supra*.)

accounts like a profit and loss account which they do not already possess and do not require for their own purposes, all that it empowers the Income-tax Officer to do is to call for accounts and documents which are, or are believed to be in existence. The production of accounts may be called for whether a return has or has not been made. As stated in paragraph 86, it is always desirable in the interests both of the assessee and of the Government that Income-tax Officers should obtain a return of income before they make an assessment. If, however, such returns are not forthcoming, they should, so far as possible, obtain the accounts of the assessee. Again, if a return is made, the Income-tax Officer has power to call for accounts wherever he considers it necessary for the purpose of testing the accuracy of return. It is, however, desirable that the least possible inconvenience should be given to assessee by the detentions of their accounts by Income-tax Officers, and Income-tax Commissioners should take steps to see that accounts are not detained for any undue time or for any unnecessary purpose. Steps should be taken to secure that the services of competent and reliable Accountants where employed by assessee should be utilised to the fullest extent by the Income-tax Officers. The latter from their experience should soon know what particular Auditors can be relied upon to give accurate figures. Where a statement of profit and loss filed by an assessee has been certified as correct and complete by such an Accountant the Income-tax Officers should, unless they see reason to the contrary, accept the statement as correct and complete with regard to the facts mentioned in it, although he will frequently have to call for details showing how various figures are made up. But in such cases the Accountant himself, when authorized by the assessee to appear on his behalf, should be asked to supply the details. Income-tax Commissioners should take steps to secure that the services of such Accountants are fully availed of".

Neglect to furnish accounts or documents asked for by the Income-tax Officer under the Section [just as under Section 22(4)] is punishable under Section 23 of this Act. Just as under

Section 22 (4), so under this sub-section power to issue notice may be exercised even after the submission of return¹ such a notice may be issued more than once. This is clear from the language of the Section itself, though there are judicial decisions on the point under Section 22 (4) Income-tax Act. Forcible production of account books and threat of use of force and police authority is not warranted by Section 22 (4) and an Income tax Officer cannot, for the purposes, enter the assessee's premises, specially against the latter's wish.² Legal presumption may be drawn from non-production of account books required to be produced under Section 22 (4); such presumption to be governed by Section 114 [illustrations (g) and (h)] of the Indian Evidence Act, 1872.³ Where the Income-tax Commissioner directs fresh proceedings to be taken under Section 22 (4) and only steps to be taken to produce account books, it merely means that the whole of the circumstances where to be re-examined. When a re-commencement of the whole proceedings is directed, the the subsequent Revenue Officers are not to bind themselves to the obvious facts when the case is taken up again.⁴

(k) **May require** :—The same words are used in Section 22(4) Income-tax Act. Thereunder it has been held that the words, 'require' means required as a price of relevant evidence and not that the Income-tax Officer should call for books or documents not relevant at all.⁵

The final arbiter of what is required is the Income-tax Officer and not the assessee.⁶

3. **Proviso** :—This proviso, fixing the time limit for which accounts may be called for by the Excess Profits Tax Officer under Section 13(2), was added by the Legislative Assembly at a motion by an Hon'ble Member (*Dr. P.N. Banerjee*). "Sub clause

(1) *Ramaswami Chettiar v. Commissioner Income-tax* Mad. 52 M. 194: 1929 Mad. 60: 8 I. T. C. 290.

Pallumal Bholanath v. Commissioner Income-tax, U. P. 6 I. T. C. 463; 1938 All. 541.

(2) *Achhru Ram v. Crown* 2 I. T. C. 167: 1936 Lah. 826.

(3) *Sankaralinga Nadar Bros. v. Commissioner I. T.*, Mad. 4 I. T. C. 226 (244).

(4) *N A. Concern v. C. I. T.* 1938 Rang. 287.

(5) *Ganga Sagar (B.R.) v. Commissioner Income-tax*, U.P. 5 I. T. C. 1421: 1931 All. 11.

(6) *Tulsidas Naginchand v. Commissioner Income-tax*, Punjab 1938 Lah. 551 (558).

(2) of clause 18 gives power to the Excess Profits Tax Officer to call for accounts without any limit of time. Now, if we look at the Income-tax Act, we find that under Section 22, sub-section (4) proviso, the period of time is limited to three years. After careful examination of the whole Bill it was settled when the Income tax Act was passed that three years was a reasonable period of time. Now, why should we not stick to that limit?"

"There is another important consideration in this regard. Clause 22 (b) of the Excess Profits Tax Bill provides that all information obtained in respect of the excess profits may be used in respect of the income-tax. If the present sub-clause is allowed to stand as it is, it would amount to amending the Income-tax Act by the backdoor. That would not be a very desirable state of things.....I believe it has been omitted through oversight."

The Government accepted the amendment. The later improvement was a drafting improvement upon the words. 'a period prior to the year 1935-36.' which were replaced by the words 'a period prior to the previous year' as determined under Section 2 of the Indian Income-tax Act, 1922, for the purpose of Income-tax assessment for the year ending on 31st day of March, 1937.

Section 14. (1) *The Excess Profits Tax Officer shall, by an order in writing after considering such evidence, if any, as he has required under section 13, assess to the best of his judgement the profits liable to excess profits tax and the amount of excess profits tax payable on the basis of such assessment, or if there is a deficiency of profits, the amount of that deficiency and the amount of excess profits tax, if any, repayable and shall furnish a copy of such order to the person on whom the assessment has been made.*

(2) *Excess profits tax payable in respect of any chargeable accounting period shall be payable by the person carrying on the business in that period.*

(3) *Where two or more persons were carrying on the business jointly in the chargeable accounting period, the assessment shall be made upon them jointly and, in the case of a partnership, may be made in the partnership name.*

(4) Where by virtue of the foregoing provisions an assessment could, but for his death, have been made on any person either solely or jointly with any other person or persons, the assessment may be made on his legal representative either solely or jointly with that other person or persons, as the case may be.

1. Previous law :—Sections. 13 and 14 Excess Profits Duty Act, 1919.

2. Analogous Law :—(1) Finance Act (2) of 1939 Section 21, Part III.

(2) Income Tax Act, Section 23, 1922 (amended 1939).

3. Scope of Section 14 :—Section 14 relates to assessment of Excess Profits Tax. While sub-section (1) relates generally to assessment of the tax, sub-section (2) indicates the person who is liable to pay the same. Provision for assessment in the case of a joint business is made in sub-section (3) while sub-section (4) provides for a case where a sole or joint proprietor of a business dies, in which case assessment may be made on his legal representative. The more usual word 'legal' was substituted for personal representative in sub-section (4) of Section 14 by the Select Committee. Under the English law, just as in the cases of the Excess Profits Duty of the former Act 1919 so at present Excess Profits Tax was not assessed locally by the General Commissioners of Inland Revenue. The administration of tax is to be carried on through the Inspectors of Taxes, who perform the preparatory work leading up to the making of assessment. It is on their recommendation that assessment has to be made. Excess Profits Tax assessment must be signed by at least two Commissioners of Inland Revenue, which is the smallest number that can act in the matter. No special direction on authority has so far been given in the United Kingdom for Excess Profits Tax assessment to be signed by one Commissioner and Excess Profits Duty assessment under the 1915 Act were also always made by two Commissioners.

In India, assessment to Excess Profits Tax is to be made by the Income-tax Assessing Officers, the Income-tax Officers who will also function under the Act as Excess Profits Tax Officers.

4. Sub-section 1. To the best of his judgment. The use of the words, "best judgment" may not be mistaken for an *ex-parte* best judgment assessment as under Section 23 (4) Income-tax Act. The expression 'best of his judgment' are to be read along with the preceding words "after considering such evidence, if any, as he has required under Section 13", that is to say, the judgment or decision of the Excess Profits Tax Officer is to be based on the evidence called for by and produced before him under Section 13 *ante*.

5. Profits liable to Excess Profits Tax :—These will be the 'excess' profits, as compared with the standard profits, determined under Section 6 *ante*.

6. Amount of Excess Profits Tax payable :—The amount of profits liable and the amount of excess profits tax payable in respect of the said profits are two different things and may not be confounded.

7. Or if there is a deficiency :—There may be cases also where on evidence it is determined that, instead of an excess of profits as compared with standard profits, there is a deficiency. Such cases would fall under Section 7, (instead of Section 6) and the matter would be dealt with accordingly, that is to say, the Excess Profits Tax Officer shall determine the amount of deficiency under Section 7 and the amount of Excess Profits Tax repayable out of the amount already paid (if any).

8. And shall furnish a copy...made :—These words were added by the Select Committee, apparently to assist the person concerned to be satisfied that the computation and calculation was correct.

9. Sub-section 2 :—Person carrying on the business in that period :—The words 'that period' obviously relate to the chargeable accounting period sub-section (2) points out the person assessable or liable to pay Excess Profit Tax. It is the person carrying on the business in the chargeable accounting period. The words are simple and definite enough so far as they go but may at times give rise to difficulty in

assessing the right person, say, when there is a change of persons carrying on the business during the chargeable accounting period.

Supposing there was a chargeable accounting period of 12 months, during the 6 of which *A* held the business, *B* carrying on the same for the remaining six months. The question is, who is assessable *A* or *B*. Is *B* to be assessed for the whole period, or is *A* to be assessed, change being ignored. Such a difficulty has arisen under the English law when the previous Excess Profits (Duty Act (Finance Act, 2 of 1915) was in force Section 45 (2) Finance, Act, 2 of 1915 provided that the Duty might be assessed 'on any person for the time being owning or carrying on trade or business'. The interpretation of the words 'for the time being' gave rise to difficulty. The question arose whether it meant the time when the chargeable accounting period ended, or the time when the person in question ceased to carry on the business or the time when assessment was made. This was the case of *Wankie Colliery Co. v. Commissioner Inland Revenue*.¹ The case gave rise to considerable diversity of views amongst the judges of the various Courts though which it passed sought to assessed. The company in this case contended, in substance, that the words 'any person etc' meant the person carrying it on at the end of the accounting period. This contention was, however, rejected in the end and ultimate decision of the House of Lords was that the term in question was the date at which assessment was made.

Section 45 of the 1915 Act gave the Commissioner of Inland Revenue power to split the accounting period if they so thought fit in case of change of ownership and to assess the old and new owner accordingly. In *Wankie's* case above cited, *Mr. Rowlatt Justice* in the King's Bench Division Court (High Court) observed:—"It seems to me that it is within the scheme of Section 45 that, if there is a change of ownership during an accounting period, the Commissioners need not

1. (1920) 8 K. B. 247; (1921) 8 K. B. 844 (1922) 2 A. C. 51; 12 T. C. 287; 17 T. C. 708.

introduce a new accounting period at the date of the change, but can assess the tax for the one period having it to be adjusted between the parties as in the common case of Schedule A, or rates or charges for water".

The above construction will not hold good where business was sold and the change took place before Excess Profits Duty was imposed. So, the question of the person assessable is not free from difficulty, in cases where change [of persons] has occurred. This was so, at least, under the United Kingdom law relating to Excess Profits Duty and, as the same words 'exist' in the Indian law also, they need a judicial interpretation as an authority.

10. Sub-section (3):—This sub-section covers the case of a joint business or partnership. Obviously enough, assessment has to be made in such a case in the name of the persons carrying on the business jointly or in the name of partnership.

11. Sub-section (4):—This sub-section covers the case of the death of a person whose profits it may be sought to assess to Excess Profits Tax, because he carried on the business resulting in profits during his life time, though he may not be available, due to death at the time of the assessment. In such a case, relying on the ordinary principle of law, his legal 'representatives' are to be assessed. For the usual rule and principle of law is that he who takes the benefit must take the burden also.

12. Either solely or jointly:—If the business was carried on by one person, his representatives will be liable to be assessed solely, if there was another person carrying on jointly with the deceased, then his legal representatives would be assessed jointly with that other person.

Section 15. *If, in consequence of definite information which has come into his possession, the Excess Profits Tax Officer discovers that profits of any chargeable accounting period chargeable to excess profits tax have escaped assessment, or have been underassessed, or have been the subject of excessive relief, he may at any time within five years of the end of the chargeable accounting period in question serve on the person liable to such tax a notice containing all or any of the*

requirements which may be included in a notice under Section 13, and may proceed to assess or re-assess the amount of such profits liable to excess profits tax and the provisions of this Act shall, so far as may be, apply as if the notice were a notice issued under that Section.

1. Previous Law :— No such provision as are contained in Section 15 existed in the Excess Profits Duty Act of 1919.

2. Analogous Law :— (1) *Indian* Section 34 Income Tax Act contains similar provisions. (2) *English* Para 5, Part 1 Assessment and Collection) of the Fifth Schedule to Finance Act 1937, relating to 'assessment' makes mention of 'Additional Assessment' also, the period of limitation for both being six years, while under Section 15, it is five years for additional assessment.

3. Scope of Section 15 :— Just like Section 34, Income Tax Act 1922 (amended 1939), Section 15 Excess Profits Tax Act seeks to assess profits that have escaped assessment or have been under-assessed, or in respect of which relief has been granted exceeding in amount what was legitimately to be granted.

The proceedings are to be initiated on the Excess Profits Tax Officer getting some definite information as to above facts, within five years of the end of the chargeable accounting period, the profits of which are in question. Notice of intention to proceed under the Section is necessary to issue to the person sought to be proceeded against, the contents of the notice are to be the same as those of the notice under Section 13, *ante*, relating to original assessment. Proceedings as to assessment or re-assessment are to be the same as those under Section 14 *ante*, relating to assessment of Excess Profits Tax.

Obviously Section 15, like Section 34 of Income tax Act, 1922, is applicable to cases in which either no assessment at all has been made in respect of the entire amount of profits liable to be assessed under the Act, or where only a portion of such profits has not been assessed. The Section is equally applicable where any relief fund under any of

the persons of the Act, as granted already is in excess of the amount in which it ought to have been granted.

The judicial decisions under Section 34 Income Tax Act, though rendered mostly nugatory, by the change of the words, 'for any reason' that prefaced the Section before the expression 'in consequence' of definite information which has come into his possession', replacing it, may yet be useful as indicating the principle underlying the policy and scheme of the Section. They are, therefore, cited hereunder just for the sake of assistance, as similar words (as amended, are now used in this Section). Clearly enough income received in a particular year escaping assessment comes within the purview of Section 34.¹ Section 34 is applicable to cases in which either no assessment has been made at all upon the recipient of income, profits or gains liable to assessment or where though an assessment has been made, some portion of income, profits or gains has, for some reason or other, not been included in the assessment orders. Such income is income which has escaped assessment and falls within the ambit of Section 34.² Section 34 is applicable where the assessee has disclosed all his income in his return of income filed and has been assessed thereupon accordingly.³ The intention of the Legislature in framing Section 34 has been to shape it on the model of the English Act, thus making its scope very wide and extensive and cover all possible cases of non-assessment to whatever cause due. The Section, therefore, also covers cases where the predecessor of the Income-tax Officer failed to assess a sum, due to a wrong application of the Act as to deduction allowable, the successor-Income-tax Officer being competent to raise the assessment already made and to assess an item already left out by his predecessor.⁴ The powers of the Income-tax Officer's under

(1) *Lal Jagmohan Dass Rastogi v. The Commissioner I. T., U. P.* 1929 Oudh 125: 8 I. T. C. 274.

(2) *Commissioner I. T. v. Dey Bros.* 9 I. T. C. 812: 1936 Rang. 219 SB-14 R. 228: 1936 I. T. R. 209.

(3) *Diwan Kishan Kishore v. The Commissioner I. T. Punjab* 8 I. T. C. 44.

(4) *Amir Singh Sher Singh v. The Commissioner Income Tax, Punjab* 8 I. T. C. 196: 1935 Lah. 361.

Section 34 are limited by the terms of the Section. No general powers of revision of assessment already made having been conferred by him under the Section, specially in cases in respect of which he has no reason to believe that it has been an under-assessment but his powers include judicial powers *e. g.* powers to issue summons for examination of witnesses etc. ¹ Section 34 applies where an assessee having at first shown loss in a particular year, and served with a notice under Section 34, at first shows loss again, but a profit in a revised return still withholding books etc. the revised return also showing profits being thus wrong. ²

The amendment now made clears up the position. It is notable that the provision of the present Section are simpler than those of Section 34 Income tax Act which are far too many and comparatively complex.

4. In consequence of definite information :- The dropping of the words 'for any reason' and the adopting of the more detailed and accurate expression in their place, contained in the words, 'in consequence of definite information which has come into his possession' 'has set lot of controversy at rest; cases like that of *Amir Singh Sher Singh* cited above are no longer of any value. The use of this healthier and clearer expression must help in the interpretation of the words following *vis.*, 'escape assessment.'

"It was put in because a great many fears were expressed that under the clause, as worded, even after it left the Select Committee, a fishing inquiry without any sort of information whatever was possible for the Income-tax Officer. That was certainly not the intention of the Income-tax administration and we put this in, in order to make it clear and, indeed, in order to stop the Income-tax Officer from making purely fishing inquiries with no basis at all. I understand, sir, that it would reassure Honourable Members opposite even more if

(1) *Ramji Dass Mahalaram v. Commissioner I. T., Bengal* 62 C. 1011 : 1936 I. T. R. 25. (See also *Kashinath Bagla v. The Commissioner I. T., U. P.* 4 I. T. C. 472.

(2) *Mir Bhan Bansi Lal v. Commissioner I. Tax, Punjab* 9 I. T. C. 295 : 1936 Lah. 750 : 1936 I. T. R. 111.

instead of the vague words 'information' we put in 'definite information'. If that is so I am quite agreeable".....(*The Honourable Sir James Grigg.*)

"I agree that if the information is definite so as to entitle him to act, that will take away what we feel would be an improper sting of the Section". (*Mr. Bhulabhai J. Desai.*)

5. Discovers :— The use of these words instead of "is of opinion" also makes the ground surer and the position clearer. Then the change brings the wording of sub-section (1) of Section 34 of Income-tax Act into accord with the wording of the corresponding English provision.

The English Income-tax Act of 1918, Section 125, which deals with re-assessment, when there has been escapement to tax, authorizes an additional assessment if the Surveyor 'discovers' that income has been omitted from the first assessment. It has been held in England under the English Act that 'discovers' may mean 'has reason to believe'. There the condition precedent to making another assessment is that the Surveyor shall do something 'discover'. A 'discovery' may be made anywhere, in the absence of, without the knowledge of, and without reference to the assessee. In the Indian Act the condition precedent is that 'income has escaped'. Opportunity being given to the assessee is necessary.

The true import of the word 'discovers' has been mentioned in some English cases. In the *King v. Kensington Commissioners* (6 T. C. 279-92) *Bray J.* pointed out that the word 'discover' could not mean 'ascertain by legal evidence'. It means simply, 'come to the conclusion' from the examination which the Surveyor makes, and if he likes, from any information he receives. In the same case, *Avory J.* observed :—"I think that word 'discovers' means 'has reason to believe' construed in that way is inconsistent with the whole scheme of this legislation". In another English case, *Ingle v. Farrand* (11 T. C. 446) *Pollock M. R.* observed : "The Surveyor is not required to form an opinion, which is later held by the Courts to be the correct view, before he

takes, action. There must be information before him which would enable him, acting honestly, to come to the conclusion that a state of facts exists requiring him to take action (see *Rex v. Bloomsbury Commissioners*, 7 T. C. 59 (1915) 3 K. B. 768, following *Rex v. Kensington Commissioners* (6 T. C. 613) (1913) 3 K. B. 870)". In *Anderson and Halstead, Ltd. v. Birrell* (H. M. Inspector of Taxes) (16 T. C. 200,208) *Rowlatt J.* observed :—"The word 'discover' does not, in my view, include a mere change of opinion on the same facts and figures upon the same question of accountancy, being a question of opinion. The meaning of the word was considered in *The King v. Kensington Income-tax Commissioner*, (1913) 3 K. B. page 870, 6 T. C. 279 where it was held that it did not mean 'ascertain by legal evidence. The import of the word 'discover' was considered in a recent English case, *C. I. R. v. Mackinlay's Trustees*, (1939), 22 T. C. 305,312) wherein the *Lord President Normand* observed as follows :—

"The question, therefore, is whether a discovery that mistake, essentially a mistake of law, has been made is a discovery within the meaning of Section 125. I think the word 'discover' in itself, according to the ordinary use of language, may be taken simply to mean 'find out'.....if there were any reason in the context for restricting the word 'discover' to the discovery of an error in fact; that restriction would necessarily receive effect, but in my opinion the context points, not to any such restriction, but, on the contrary, to so wide a meaning that the word ought to be held to cover just the kind of discovery which was made here, when the Special Commissioners found out that, by reason of a misapprehension of the legal position, certain of the profits chargeable to tax had been omitted from the first assessment."

6. Escaped assessment :—The same expression is used in Section 34, Income Tax Act, 1922 (amended 1939). There is a heap of case law in connection with the expression 'escaped assessment' under Section 34 and most of it would, it is considered, be of value and assistance in following the true import of the expression under this Act also. The same has, therefore, been cited herein.

The word 'escape' as used in Section 34 connotes failure by the taxing authorities, to tax the income owing to accidental or deliberate omission by the assessee to declare it, or to some similar circumstances. ¹ Allowance paid by the assessee to his younger brother, member of an impartible estate, being an allowable deduction, could not be said to be income that escaped assessment'. ² A thing cannot be said to escape certain consequences unless it is capable of facing or being subjected to those consequences. ³ Hence where an Insurance Co. started business in May 1924 and the first Actuary Report was, under the Rules, prepared after four years, in 1928-1929, on the basis of which the company was duly assessed, its income for 1927-1928 cannot be assessed on the same basis under Section 34, as having escaped assessment, for there was no machinery for calculating the income of 1927-1928 and the provisions of Rule 25 once framed being mandatory and having the force of law. ⁴ Be it stated that the expression 'escaped assessment', used in Section 34 has been differently interpreted by the different Courts in India and the point is not, therefore, free from difficulty. Most of these cases have been cited under note 4, *supra* with reference to the point involved therein, as indicating the scope of Section 34. The interpretation put in these as also in other cases by the several High Courts is briefly noted below in *Krishna Kishore v. Commissioner I. T. Punjab*. ⁵ "The expression has been held to connote *failure*, by the taxing authority, to tax the income owing to accidental or deliberate omission by the assessee to declare it, or to some other circumstances. Income known or disclosed to the taxing authority which has been assessed was held as not included. In *Burn and Company v. Commissioner Income tax Bengal* ⁶ it was observed :—"The Commissioner seems not to have appreciated that the expression 'escaped assessment' is not the same as 'escaped from assessment' and that upon the assumption that there was at one time

(1) *Dewan Kishan Kishore* 14 L. 255, 6 I.T.C. 845: 1939 Lab. 284.

(2) *Ibid.*

(3) *Per Jai Lal J.* in *Lakshmi Insurance Co. v. Commissioner I. T. Punjab* 5 I.T.C. 24: 12 L. 757: 1931 Lab. 441.

(4) *Ibid.*

(5) 6 I.T.C. 845.

(6) 7 I.T.C. 86.

an assessment of the income of Messrs. Burn and Company at the proper time, it would scarcely be right to say that they escaped assessment in respect of that income at a latter period.

In *Rajindar Nath Mukerji v. Commissioner Income Tax, Bengal*¹ Their Lordships of the Privy Council observed:—
“The appellants, however, submit that this is a case of income escaping assessment within the meaning of Section 34. Assessment, they argue, is a definite act, indeed the most critical act in the process of taxation. If an assessment is not made on income within the tax year, then that income, they submit has escaped assessment within that year and can be subsequently assessed only under Section 34 with its time limitation. This involves reading the expression ‘has escaped assessment’ as equivalent to ‘has not been assessed.’ Their Lordships cannot assent to this reading. It gives too narrow a meaning to the word ‘assessment’ and too wide a meaning to the word ‘escaped’. That the word ‘assessment’ is not confined in the statute to the definite act of making an order of assessment appear from Section 66 which refers to ‘the course of any assessment.’ To say that the income of *Burn & Company* which in January, 1928, was returned for assessment and which though it was accepted as correctly returned and though it was erroneously included in the assessment of *Martin & Company* has ‘escaped’ assessment in 1927-1928, seems to Their Lordships an inadmissible reading. According to the Allahabad High Court, in a proceeding under Section 34, Income Tax Officer, and after him the Assistant Commissioner only deal with extra income which has not been assessed to income-tax. No jurisdiction is given to either of these Officers by Section 34 to make a new assessment for the purpose of taking the whole of that assessment under the Income-tax Act.”²

In *Chotey Lall (R.B.) v. Commissioner Income Tax*, U. P.,³ notice under Section 34 was issued upon discovery of a mistake of their by the Department as to super-tax. It was held that, taking the word ‘assess’ as meaning to determine the amount on which the tax is payable, no income has escaped assessment

(1) 7 I. T. C. 153

(2) *Kashi Nath Bagia v. Commissioner I. T.* U. P. 4 I. T. C. 472.

(3) 5 I. T. C. 466.

when it could not be said that any portion of assessee's income was not discovered as income liable to be taxed.

*U Lu Nyo v. Commissioner Income Tax Burma*¹ is an important case on the point. In this case, after an assessment had been made for a particular year on the assessee by an Income-tax Officer on the materials before him, another Income-tax Officer in the following year purporting to proceed under Section 34, practically raised the former year's assessment holding that his predecessor was wrong in taking a particular figure for the assessment of the assessee's business. It was held that the second Income-tax Officer had no jurisdiction to do so. It was observed:—"The Income-tax Officer had no jurisdiction to revise the assessment for the previous year which was completed and had become final. We are of opinion the assessment which he made was not under Section 34, but was, an attempt by one Income-tax Officer to go behind and revise the assessment made by the other Income-tax Officer in the previous year merely because he disagreed with his predecessor's findings as to the amount of the assessable income. In our opinion he had no jurisdiction to do so. The assessment cannot be sustained. The same question came up before the same High Court (Rangoon) in *N. N. Burjorji v. The Commissioner Income Tax, Burma*² and in this case it was laid down that Section 34 was applicable to cases which either no assessment at all been made upon the person who received the income, profits or gains liable to assessment, or where an assessment had been made in the course of the year but some portion of the income profits or gains of such assessee for some reason or other had not been included in the order of assessment. It was expressly remarked in that judgment that such income was income which had escaped assessment in the year and fell within the ambit of Section 34 of the Act. *The Anglo Persian Oil Co's* case³ is another case where the meaning of 'escaped assessment' were considered. In this case *Rankin, C. J.* observed:—"I see no way of

(1) 17 I. T. C. 47.

(2) 5 I. T. C. 270

(3) 6 I. T. C. 419.

holding that Section 34 is inapplicable to put right an assessment by which a deduction has been improperly allowed. Such a case is, may opinion, a case of income escaping assessment, not the whole income of the assessee but a part of it escaping assessment and there is nothing in Section 34 which limits to cases of non-disclosure by the assessee, of discovery of new matter by the Income-tax authorities or inadvertence as distinguished from erroneous deliberation on the part of these authorities. In most cases of under-assessment of profits it could be said that the whole profits were assessed at a certain figure, but where that figure is shown to be less than the true amount of assessable profit, the balance has, in my opinion 'escaped assessment' within the meaning of these words as they appear in Section 34."

In *Commissioner Income Tax v. Sir Krishan Chand Gojpati Dass, Raja of Parlakemedi*¹ Sir Murray Coatts Trotter, C.J. (Beausley, J. agreeing) observed:—"It is said that 'escaped assessment' must mean not that the question has been considered and decided in favour of the assessee, but the Income-tax Officer has omitted to consider the question at all, or was unaware of the existence of the property, now sought to be taxed, and, therefore, passed it over, and it does not apply to cases where the Income-Tax Officer, on consideration, came to the conclusion, *ex-hypothesi* an erroneous conclusion, that the portion in question was not assessable. It seems to me that that construction is forbidden by the alternative case put in the Section; "Where the income.....has been assessed at too low a rate" that cannot be a matter of mere inadvertence, that must refer to a deliberate assessment made by the Income tax Officer in the preceding year with knowledge of the facts and circumstances. It appears to me that a similar view must be taken of the previous words 'escaped assessment' and that it applies to cases, where the Income Tax Officer has deliberately adopted an erroneous construction of the Act just as much as to a case where the Officer has not considered the matter at all, but simply omitted the assessable property from his view and from his assesment." This judgment was followed in the Anglo Persian Oil Co's case. In

(1) 2 I. T. C. 104.

*Sundaresa Iyer v. Commissioner Income Tax, Madras*¹ an under-assessment in respect of particular sources of Income was held to be enough to proceed under Section 34, in a 23 (4) assessment's case. It would appear from the findings in all these cases cited above that the words 'escaped assessment' have received various interpretations at the hands of various High Courts at various times. And, it is particularly to be noted, that as is often the case in the matter of such interpretations, the same has been guided and coloured, more or less, by the facts and circumstances of each case. This is amply borne out by the observations of Ragnekar, J. (of the Bombay High Court) made in a recent case (*Commissioner I. T. Bombay v. Pirojbai*) referred to and discussed at the end of this note *infra*. The learned Judge observed:—"In my opinion, a case is an authority for what it decides, and not what may seem logically to follow from it, and expressions of opinion, even of eminent Judges, must be limited, unless there is a very strong indication to the contrary, to the facts which they had before them."

Apart from the cases mentioned above, recently there have been decided a few cases on the point of the interpretation of the words 'escaped assessment' which are of great help and interest. In a Bombay case *Gopal Vaij Nath Manohar v. The Commissioner Income Tax, Bombay*,² assessee, carrying on *sarafi* business, but having no account books was assessed at a flat rate basis, under Section 23 (3) by the Income-tax Officer. The successor of the assessing Income-tax Officer, reopened the assessment under Section 34 considering the flat rate of gold applied by his predecessor (3% to be low and raised it to 15%). The successor Income-tax Officer's assessment was set aside as it was observed by the High Court, that no proof existed that any income had escaped assessment. In the course of judgement *Beaumont, C. J.* however observed:—"We have been referred to a decision of the full Bench of the Rangoon High Court in *U. Lu Nyo v. The Commissioner of Income Tax* (7 I.T.C. 47) as supporting the proposition that income from a particular source cannot be re-assessed under Section 34. I agree

(1) 2 I. T. C. 178.

(2) S.I. T. C. 278: 1935 Bom. 410: 49 B. 616: 1935 I.T.R. 372.

with the actual decision in that case which was one where the Income tax Officer of the subsequent year disagreed with the estimates of the Officer in the previous year, but in the course of his judgment the learned Chief Justice said that the Income-tax Officer had no jurisdiction to revise the assessment for the previous year, which was completed and had become final. If that proposition is correct, it would confine Section 34 to cases in which a source of income has escaped assessment, and that in my view confines the Section within too narrow a limit. I feel no doubt that if it were proved that Rs. 2,000 had been received as income from a particular source, while the assessment was only Rs. 1,000 or if it were proved that the assessment was at a flat rate of 3 per cent, whilst in fact profits at a higher rate had been made then income would have escaped assessment within the meaning of Section 34. That view was taken by the Calcutta High Court in *The Anglo Persian Oil Co., (India) Ltd. v. The Commissioner of Income-tax, Bengal* (6 I.T.C. 419) and by the Madras High Court in *The Raja of Parlakemedi v. The Commissioner of Income Tax, Madras* (2 I.T.C. 104) with both of which decisions I agree. In rejecting enhanced assessment under Section 34 of the succeeding Income-tax Officer His Lordship concluded:—"I guard myself against expressing any opinion, upon that the position would be if it were shown that the assessee had given false evidence or suppressed material facts and thereby induced the assessment made by the first Income-tax Officer. That is not the case here. The first Income-tax Officer knew or had the means of knowing that the price of gold was raising and with that fact before him he estimated the profits at a particular rate on sales, and the second Income-tax Officer does no more than say that, in his opinion, on the facts, the estimate of the first Income-tax Officer was obviously too low. That is not proof that any income escaped assessment or was assessed at too low a rate." This observation of *Ragnekar, J.* in this case, in his separate (though concurrent) judgment summarize the entire law on the point as evolved out of the case-law above noted, and otherwise existing on the point. His Lordship observed—"There seems to be, from the decided cases, two views taken as regards the meaning of this Section. One view is that the Section is used

in correcting an assessment in which a deduction has been improperly allowed or a low rate has been calculated or has been under-assessment or otherwise. The other view is that the word 'escaped' refers to income which has actually escaped assessment and not to any income which has already been the subject of assessment. In my opinion, the first view is correct. The words of the Section are clear and upon the plain meaning of the Section there seems to be no reason to limit the scope of the Section. All that the Section means is that if in the taxing year the income assessed is not the whole of the income of the year of assessment, then, within a time limit provided in the Section, it is open to the Income-tax authorities to revise it, whether the assessment previously made was inadvertent or was due to a wrong allowance or improper deduction or a low rate." His Lordship differed from the view taken in the Burma case of *U. Lu Nyo* where it was held that it was not open to an Income-tax Officer to go behind and revise the assessment made by his predecessor which was completed and had become final. "In my opinion, the remarks of the learned Chief Justice in that case in the last paragraph at page 121 are too wide and do not correctly represent the meaning of the Section".

His Lordship also agreed with the view taken in *Anglo-Persian Oil Co's case* (6 I.T.C. 419 cited above).

In *Amir Singh Sher Singh's* (a Punjab case) decided by three Judges of the Lahore High Court, the judgment of the dissenting Judge (*Dalip Singh J.*) while discussing some of the case-law above cited already, throw a flood of light on the expression 'escaping assessment' as interpreted by the Privy Council. The learned dissenting Judge, in his dissentient judgement, while re-capitulating the facts in a lucid manner, discussed at length the P. C. judgement in *Rajendra Nath Mukerjee's* case. His Lordship observed that in Their Lordships view the word 'escaped' was not to be read in the widest sense, that the word was capable of bearing and that it seems that Their Lordships intended to hold that the word 'escaped' is equivalent to 'elude notice' in the course of assessment, and did not mean had avoided being assessed. His Lordship discussed the view taken in *Lachhiram Basant Lall*

Nathan v. Commissioner I. T., Bengal (5. I. T. C. 114) and also pointed out that Section 25 of the English Act, 1918; (referred to by the Judges who decided *Amar Singh Sher Singh's* case) did not throw any light on the point. Observed His Lordship with reference to this:—"It is clear that the words 'profit omitted' do not cover a case of this kind where the Income-tax Officer has rightly or wrongly given deliberation to the subject and has rejected the income from assessment on the ground that the income belongs to some person other than assessee. If Section 34 was intended to mean that whenever an income had not been assessed in a final assessment order owing to some mistake of fact or law by any Income-tax authority or by any omission or default on the part of the assessee, the Income-tax authority could review his previous decision or make a demand for a return on the assessee, it seems to me that it could easily have been expressed in that manner.

Referring to Section 125, English Income-tax Act, the Honourable Judge pointed out that there is nothing to show that the intention of the Legislature was to shape Section 34 on the model of Section 125 of the English Act. I would, therefore, with great deference to the learned Judges who decided that case, express my respectful dissent from the reasoning of that case. That case, however, on its facts is clearly distinguishable. It was a case of an Income Tax Officer wrongly deciding that certain deduction allowed should not have been allowed. Now, while Section 125 of the English Act appears to expressly provide for that case, for the reasons I have given, I do not think that the words 'escaped assessment' cover that kind of case at all. It seems to me, further, that that case was wrongly decided because assessment means the course of assessment.

The course of assessment involves both the calculation of the income and the charging of the income. In order to escape assessment an income must avoid both calculation and charging. In the case where a deduction has been wrongly allowed, the income has possibly escaped being charged, but has not escaped calculation. It is true that the arithmetical result is the same, but that is not the same thing as holding that the calculation

never took place. I can see no distinction arising between a mistake of fact and a mistake of law on the part of the Income-tax Officer on the words of the Statute. If, therefore, this ruling were correct, it would be open to the Income-tax Officer to revise his decision on the ground of any mistake of fact or law. This appears to me to go beyond even the provisions of Section 125 of the English Act. It is opposed to the decision in *U. Lu Nyo v. Commissioner of Income Tax, Burma* (8 I. T. C. 47) which was conceded to be rightly decided by the learned Counsel for the Income tax authority.

The position as revealed so far by the decisions on the point of the applicability of Section 34 of the Income Tax Act as has been rightly observed by His Lordship *Ragnekar J.* in *Gopal Vaij Nath's* case (8 I. T. C. 273 cited above) is that there are two views as to the applicability of the Section, one a narrow view and the other a wider one. The narrow view is that the Section applies only in correcting an assessment in which a deduction has been improperly allowed, or a low rate has been calculated or there has been an under assessment other assessment otherwise. The other, the wider view, is that the word 'escaped' refers to income which has actually escaped assessment, upon which there has been no assessment at all (such as the one in respect of which no notice under Section 22 (2) has been issued as was the case in the last *Bombay case of Pirojbai*) and not to any income which has been the subject of assessment already. The learned Judge who made the above analysis of the two view-points on the question agreed with the first view observing. "The words of the Section are clear and upon the plain meaning of the Section *there seems to be no reason to limit the scope of the Section.* The same has in effect, been the view taken in the Bombay cases of *Gopalji Vaj Nath* (8 I. T. C. 273), *Commissioner I. T. v. Pirojbai* (1936 Bombay 214), the views of the Honourable learned Judges who decided both these Bombay cases having been the same. This view has also been shared by the Lahore High Court Judges who decided the two cases of *Amir Singh Sher Singh* (8 I. T. C. 198) and *Madan Mohon Lall* (8 I. T. C. 413) and who also happened to be the same in both the cases (the Honourable *Dalip Singh J.*

the third Judge of the full Bench in *Madan Mohan Lal's* case dissenting) while, as already observed, the facts of each case have been its own, the main point of law resolves itself into this. Whether a limited or a wider interpretation is to be put on Section 34 so far as the expression 'escaped assessment' is concerned. The view of the two High Courts, Bombay and Lahore, just cited above is that there is no reason to limit the scope of Section 34. In *Rajender Nath Mukherjee's* case, however, Their Lordships of the Privy Council point out that if 'has escaped assessment', is to mean 'has not been assessed' Their Lordships cannot assent to this reading as it gives too narrow a meaning^{*} to the word 'assessment' and too wide a meaning[†] to the word 'escaped'.

7. Within five years:—The limitation for taking action under Section 15 has been fixed at five years as against the four or eight years under Section 34. The period is to count from the end of the chargeable accounting period in question.

8. Notice:—The issue of notice is a condition precedent to the taking of proceedings under the Section. The notice should contain all the particulars required by Section 13 of the Act. The case law under Section 34, on the point of 'notice' may also be of interest utility, hence it is cited herein.

In *Burn & Co. v. Commissioner I. T., Bengal* ¹ the notice was in the form of a letter instead of being in the common form prescribed by the Central Board of Revenue, but, in fact, all the details provided for in the form of notice had been dealt with in the letter, *Srinivas Aiyangar, J.* in holding the notice to be good in form observed:—"It is to be observed that there is no standard form of notice prescribed in Section 34 itself. All that the Section requires is that a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22 shall be served. Mr. Sundaram in

[†] It is clear from judgment of Privy Council that word 'escaped' is not to be given its widest meaning "per Dalip Singh, J. dissentiate in *Madan Mohan Lal* case 8 I. T. C. 414, (487).

(1) 7 I.T.C. 96:1934 Calcutta 515: 1934 I.T.R. 80.

his well known text book, "The Law of Income-tax in India" 3rd Edition at page 844 says: "If the information on which the supplementary assessment is proposed to be made has already been furnished by the assessee himself though in some other connection, and it has also been verified by him, it is strictly speaking unnecessary for the Income-tax Officer to issue a notice, though in practice, the assessee is probably given an opportunity of being heard, on the analogy of the provision in Section 35. We are quite satisfied that the form of the notice which was given on 31st March 1931, was sufficiently and properly complied with the requirements of Section 31 of the Income-tax Act."

In *Commissioner Income Tax, Madras v. A. R. Sunderesa Aiyar*¹ it has been held that a notice under Section 34 need not specify the detailed grounds on which the assessment was proposed to be reopened. In *Naval Kishore Khairati Lall v. Commissioner Income Tax, Punjab*² the assessee was being treated as agent of a non-resident* firm of Jaipur State under Section 43 but no order declaring them as such was passed, in consequence of which notice issued under Section 22 (2) was invalid. Proceedings under Section 34 also were held to be invalid as the Income-tax Officer tried to evade issuing a fresh notice under Section 22 (2) In *Ramjidas Mahaliram v. Commissioner Income Tax, Bengal*³ a notice containing the words 'the Income-tax Officer has reason to believe' was held to be sufficient. In *Naval Kishore Khairati Lall v. Commissioner Income Tax, Punjab*⁴ it was held that the provision in Section 34 as to the service of notice to the assessee within the prescribed period of one year controlled also the power of review of the Commissioner under Section 33. Where the assessee shows loss in business in a particular year and is consequently not assessed, but subsequently the income-tax authorities getting certain information as to the assessee's income in that year,

(1) 2 I. T. C. 173.

(2) 7 I. T. C. 409 : 1934, T. R. 350.

(3) 1936 I. T. R. 25 : 62 C. 1011.

(4) 9-I. T. C. 256 : 1936 *Lah. 397* : 1936 I. T. R. 267 P. L. R. 1107.

serve him with a notice under Section 34, notice is legal. ¹ Note the use of the word 'may' in connection with, the issuing of notice under Section 34. On the face of it, the use of the word 'may' shows mere discretion to issue such notice or not. That, however, it is not so. Once the Income-tax Officer decides to proceed under Section 34 *he must issue a notice to the assessee and follow the same procedure as in the case of original assessment.* That is evident from the particulars of notice required to be the same as these under Section 22 (2). Any particulars beyond these cannot be required to be proved under Section 34 though they may be required under Section 37 of the Act. Default in compliance with notice under Section 34 will involve the consequence of an assessment (or re-assessment) under Section 23 (4) ². Assessee having two different branches of business made a return showing income from both. On a notice being served under Section 34 requiring him to furnish the return of one of the branches, the assessee merely pointed out that he had already submitted a return of both the branches of his business. This was held not to be a compliance with notice under Section 34 ³. Once a notice under Section 34 has been served on the assessee and a return filed by him in response thereto proceedings may, on his death, be continued against his successor, without the issue of a fresh notice ⁴. "A notice under Section 34 need not specify the detailed grounds on which it is proposed to re-open the assessment."⁵ Form of notice is to be found in the Rules.

9. May proceed to assess or re-assess :— The same words have been used in Section 34 Income-tax Act. The case law, therefore, under the said Section may be of use and is, therefore, cited herein. Proceedings of assessment and re-assessment under Section 34 may be taken against partners of a firm individually, irrespective of the firm's liability to assessment. ⁶

(1) *Vir Bhan Banai Mall v. Commissioner I. T., Punjab* 9 I. T. C. 225 : 1936 Lch. 750 : 1936 I. T. R. 111.

(2) *Kadarnath Kesaria Lal v. Commissioner I. T., Bengal* 53 C. 254 : 1931 Cal. 209 : 4 I. T. C. 407.

(3) *Ramchander Kashi Nath v. Commissioner I. T. B. & 5 I. T. C. 58.*

(4) *Commissioner I. T. Mad. v. Nachalachi* 1936, Mad. 63.

(5) Para. 104 (4) I. T. M.

(6) *Burn & Co. v. Commissioner Income Tax, Punjab* 6 I. T. C. 135 (141)

On the same principle, where proceedings under Section 34 against a firm fail for want of jurisdiction and fresh ones are time-barred they may lawfully be taken against partners.¹ The powers of the Income-tax Officer to assess or re-assess under Section 34 are limited by the terms of the Section which give no general power of revision to the Income-tax Officer who reopens the assessment in respect of which he has no reason to believe that the assessee has been under-assessed. The power of the Income-tax Officers under this Section of the Act include judicial powers *c. g.*, to issue commission, for examination of witnesses etc. There are no words in Section 34 empowering an Income-tax Officer to determine the existence of preliminary state of facts.² An Income tax Officer should not levy penalty under Section 28 when the return in compliance with a notice under Section 34 shows true income though he had originally in his return under Section 22 (2) showed an incorrect income.³ Where, however, the return filed on notice under Section 34 is proved to contain an incorrect income, penalty may be levied.⁴ Orders of assessment or re-assessment under Section 34 may be dealt with in appeal only as to the part of income that had escaped assessment and should not deal with the original assessment.⁵

10. And the provisions of this Act shall apply:— These words mean that assessment has to be made as under Section 14 of the Act and the notice is to be treated as one under Section 13 *ante*.

Section 16. *If the Excess Profits Tax Officer, the Penalties. Appellate Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act, is satisfied that any person has, without reasonable cause, failed to furnish the return required under sub-section (1) of Section 13, or to produce or cause to be produced the accounts or documents or other evidence required by the Excess Profits Tax Officer under sub-section (2) of that section, or has concealed particulars of the profits made by or capital employed in the business, or has*

(1) *Neem Chand Dagga v. Commissioner I. T. Punjab* 5 I. T. C. 208

(2) 1936 I. T. R. 25 : 62 C. 1011.

(3) *Maya Ram Durga Pershad v. I. T. C.* 5 I. T. C. 471.

(4) *Guru Charan (a re 1931 All. 421 : 63 A. 445.*

(5) Para. 10 : LT.M. see also *Kanishi Nath Bagla v. Commissioner I. T.* 4 I. T. C. 472.

deliberately furnished inaccurate particulars of such profits or capital, he may direct that such person shall pay by way of penalty, in addition to the amount of any excess profits tax payable, a sum not exceeding—

- (a) where the person has failed to furnish the return required under sub-section (1) of Section 13, the amount of the excess profits tax payable; and*
- (b) in any other case, the amount of excess profits tax which would have been avoided if the return made had been accepted as correct :*

Provided that the Excess Profits Tax Officer shall not impose any penalty under this Section without the previous approval of the Inspecting Assistant Commissioner.

Previous Law :—Section 12, Excess Profits Duty Act, 1919.

Analogous Law :—

*(a) Indian :—*Section 23(1) Income-tax Act, 1922, (amended), 1939 Only the amount of penalty given in clause (a) and (b) is different from that to be levied under Section 28 Income-tax Act. Under Section 28(1) (c) the provision is sub-section (6) of Section 28.

*(b) English :—*R. 4, Part III, Finance Act, 1937 relating to National Defence Contribution, the provisions whereof have been made applicable to Excess Profits Tax in United Kingdom, contains provisions penalizing default in submission of return of profits. The said rule runs as under :—"If any person without reasonable excuse contravenes or fails to comply with any of the foregoing provisions of this Part of this Schedule, he shall be liable on summary conviction to a fine not exceeding five hundred pounds, and, in a case where he fails to comply with the requirements of paragraph 2 of this Part of this Schedule, to a further fine not exceeding fifty pounds for every day on which the failure continues." .

Scope :—Penalty under this Section (just as under Section 28) is leviable in the course of any proceedings under this Act. As in the case of Income-tax return, so here, the returns of profits for assessment to Excess Profits Tax must be verified in the prescribed manner and any false statement in any such verification would be an offence punishable under Section 23 of this Act, which corresponds to Section 52 Income Tax Act.

There is no such provision in this Section as exists in Section 28 (4), laying down that there will be no prosecution for offence when on the same facts penalty has been levied. (See Section 25 *post*.)

Nor does Section 23 make it clear. In a case under the Income-tax Act it has been held that the rejection of an assessee's account and basing the assessment on estimate of income does not debar an Income-tax Officer from proceeding under Section 28¹ (corresponding to this Section 16 of this Act). The ingredients that go to make up the conditions precedent to the infliction of a penalty are:—(1) the Income-tax Officer, in the course of a proceeding, must be satisfied that an assessee has deliberately furnished inaccurate particulars of his income, and has thereby returned it below the real amount; (2) there must be a determination by the Income-tax Officer that the assessee has furnished inaccurate particulars of the income, and (3) a refusal on the part of the Taxing Officer to accept the income returned, as correct.² An enquiry under Section 28 includes the allowing of evidence to be introduced by the assessee in order to determine that real income disallowing such evidence being illegal.³ Penalty under Section 28 can be imposed only when the proceedings out of which assessment has been made (be they under Section 34) are legal and valid and not when they are invalid.⁴

(1) *Mata Pershad v. Commissioner Income Tax* 10 I. T. C. 191.

(2) *Mayaram Durga Pershad v. Commissioner I. Tax*, U. P. 5 I. T. C. 57.

(3) *A. A. R. Concern v. Commissioner Income-tax, Burma* 11 R. 75 Rang. R. B. 6 I. T. C. 385.

(4) *Sheik Abdul Kadar & Co. v. Commissioner Income-tax, Madras*. 3 I. T. C. 372: 1927 Mad. 1928.

Looking the principle of the Excess Profits Tax Act, the principle of the above rulings should in the face of it be applicable to Excess Profits Tax Cases.

Appellate Assistant Commissioner :—

An Appellate Assistant Commissioner is competent to levy penalty while hearing an appeal, while there is a gross mis-statement of income. This is so under the Income tax Law ¹ and must hold good under the Excess Profits Tax Act also.

Commissioner :—A Commissioner may also impose penalty where none has been imposed either by the Income tax Officer or the Appellate Assistant Commissioner. This original order of the Commissioner is final, not subject to reference to the High Court under Section 66. ² A commissioner could not, in deciding that the imposition of penalty by Assistant Commissioner was illegal, re-impose it himself. ³

In the course of any proceedings under this Act: These words, taken from the Income-tax Act (as amended) widen the scope of the Section so as to embrace all proceedings *i. e.* proceedings under Section 15 (profits escaping assessment), proceedings in appeal and revision (under Section 17 and 18) repayment under Section 7.

The term 'any' is limited to the proceeding in hand at the time before the Income-tax authority. ⁴ This was a case where the income revealed (though wrong in Section 23 proceedings) was correct in Section 34 (I. T. Act) proceedings (corresponding to Section 13 and 15 of Excess Profits Tax Act). Converse was the case of *Batuk Prasad* ⁵ wherein income, was avoided in Section 34 corresponding to Section 15 of this Act. Penalty was levied in the case. Penalty should not be

(1) *Pitta Ram Swamiah v. Commissioner Income tax*, Madras 49 M. 831 : 1927 Mad. 49 : 2 I. T. C. 1936 (197).

(2) *Jungi Bhagat Ramawtar v. Commissioner I. T. B. & O.* 1930 Pat. 129 : 3 I. T. C. 418.

(3) *Benarsidas v. Commissioner I. Tax Punjab* 1936 Lah. 585 : 1936 I. T. R. 217.

(4) *Maya Ram Durga Pershad v. Commissioner Income tax U. P.* 5 I. T. C. 471.

(5) 5 I. C. T. 138.

levied wherein proceedings under Section 34 (corresponding to Section 18) assessee showed a correct amount of income. ¹

These words have been retained in the amended Income-tax Act, also, in a recent Punjab ruling, it has been held that sub-section (1) of Section 28 is not happily worded and that for want of clearness and precision in the language disputes arise. Though the Section has been re-cast by the amending Act, 1939, yet the ambiguous words *i. e.* in the course of proceeding under the Act are still there. Even according to the Section as it is standing now once proceedings under Section 28 have been within the time prescribed, penalty order can be passed even after the passing of assessment order as to payment of tax. ²

Is satisfied :— In a Burma case under Section 28 Income-tax Act, relating to penalty, it was observed by *Page C. J.* in *A.A. R. Concern v. Commissioner Income Tax*. ³

Section 28 relates not to an assessment of income for the purpose of income-tax, but to the imposition of a penalty for making a deliberately false return of income; and by taking proceedings under Section 28, the assessment of income for income-tax can neither be altered nor affected. Under Section 28, however, whether a penalty ought to be imposed and, if so, the amount of penalty, are matters that, subject to Section 30 to 32, lie within the discretion of the Income tax Officer and upon these questions the assesseees are entitled to be heard [Section 28 (3)]. In my opinion in such an enquiry evidence adduced by the assessee purporting to disclose the real income of the assessee is relevant and admissible not for the purpose of varying or affecting the assessment made for the purpose of imposing the tax under the Act, but in order to show either that no penalty ought to be imposed, or that the amount of the penalty ought to be less than the maximum prescribed under Section 28.

The principle of the above case must be applicable under Section 16 of this Act also. The words 'is satisfied' being the same.

(1) *Alaya Ram Durga* Pd. 5 I. T. C. 471.

(2) *Virbhan Bansi Lal v. Commissioner Income-tax* 1938 Lab. 749.

(3) 6 I. T. C. 388 : 11 R. 75 : 1933 Rang. 50.

"Satisfied" must mean satisfied by evidence to be adduced by assessee purporting to disclose his real profits.

Without reasonable cause:—"Under Section 28 of Income-tax Act, if there was any reasonable cause for not having made a return in response to notice, then no penalty can be executed. And if a person is illiterate and has not seen the public notice that clearly is a reasonable cause, and so penalty can be executed. The above was the observation made in the Assembly in the course of debate on the Amended Section 28 (*by Mr. S. P. Chambers*).

The point of 'compulsory returns' in response to general notice published in papers in connection with which it was observed does not come in wide regard to Excess Profits Tax. At the same time it may be said that the question of, a cause being reasonable or not is after all, one of fact to be determined with reference to the facts of each case of at least a mixed question of law and fact, just like 'sufficient cause' under Section 27 Income-tax Act, 1922.¹ There has been a conflict of decisions on the point, one of the recent judicial pronouncement on the point being that it is after all a question of fact which may at times be levied into one of law.²

In a comparatively recent case, relating to the sufficiency cause under Section 27 Income-tax Act, where the plea was the usual one of illness, supported by a medical certificate, their Lordships of the Privy Council agreed with the Income-tax Officer in not accepting the same as might cause. They observed:—"His application under Section 27 for cancellation of assessment was doomed to failure and his appeal to the Assistant Commissioner under Section 30 was equally incapable of success. The questions involved 'were purely questions of fact indeed, one might say of self-evident fact, and no reference in regard to these should have been made under Section 66(2). No question of law was involved nor is it possible to turn a mere question of fact into question of law by

(1) *Kajori Mal Kalyan Mal. v. Commissioner Income-tax* U. P. 31 T. C. 451.

(2) *Bhawani Sahai v. Commissioner I. T., Punjab* 1936 I. T. R. 222.

asking whether as a matter of law the officer came to a correct conclusion upon a matter of fact. The Judicial Commissioner has treated the matter as a wrongful exercise of a judicial discretion. Their Lordships are unable to appreciate this reasoning." In view of this the principle as laid down in 5 I. T. C. 459 and 3 I. T. C. 451 no longer holds good.

The plea that the books of the assessee (of Bihar and Orissa) that the books were in Rajputana and that the time allowed to produce the same was not sufficient was not entertained, although a post card was also produced to prove that the partner had gone on pilgrimage ¹ Non-auditing of accounts ² litigation and illness ³ forgetfulness on the part of one entrusted with accounts ⁴ and non-production of details of foreign business and any documents in support thereof, accompanied with a bare allegation that the books were with the assessee's brother in foreign territory ⁵ were all held to be insufficient causes and the question was held to be one of fact and not of law fit for reference to the High Court.

The plea of non-confirmation of appointment as Receiver, after service and acceptance of notice by him under Sections 34 and 22 (2) (equal to Sections 15 and 13 of Excess Profits Tax Act, 1940) followed by one under Section 23 (4) was held to be insufficient. ⁶ Invalid service of notice was held to be sufficient cause in a Madras case (Abdul Kadar & Co. 2 I. T. C. 372 : 1928 Mad. 257). It is after all a matter of exercise of right discretion to judge whether a cause is sufficient or reasonable. The test has thus been laid down by *Sir Arnold White C. J.* in a Madras case ⁷ "The test is—has the discretion been exercised after appreciation and consideration

(1) *Chiranjimal Govind Prasad v. Commissioner Income-tax B. & O.* 5 I. T. C. 28.

(2) *Manbhumi Transport Co. Ltd. v. Commissioner Income-tax B. & O.* 5 I. T. C. 203 (207).

7 I. T. C. 368; 1934 I. T. R. 303, 1934 Lah. 483.

(3) *Nanhe Mal Jankidas v. Commissioner Income-tax Punjab*

(4) *Lalit Kishan Mitra In re.* 4 I. T. C. 467.

(5) *Bhawani Sahai v. Commissioner I. T. Punjab* 6 I. T. C. 222.

(6) *A. I. A. R. firm by Official Receiver v. Commissioner Income-tax Burma* 8 I. T. C. 195 : 1936 I. T. R. 97.

(7) *Kichilappa Naicker v. Ramanujam Pillai* 25 M. 167.

of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion and after the application of the right principle to those facts? If a discretion is exercised under these conditions and a certain conclusion is arrived at, that conclusion is an exercise of discretion judicially sound though an appellate tribunal might be disposed to draw a different inference from the facts".

In another Madras case¹ the observations of *Schwabe C. J.* are equally opposite. His Lordships observed: - "When for some reason a man has not attended a case in Court and there is no sufficient explanation of his absence, the case, by reason of his absence, is allowed to go *ex parte*. If he comes to Court afterwards and asks that his case may be restored to file, the question to be considered by the Court is not whether by same human possibility, being wise after the event, he could not have got there in time or whether a man who studied his railway guide a little better, would not have got another train or taken another route, but whether a man honestly intended to be in Court and did his best though in his own stupid way to get there in time and once the Court is satisfied, and as was the fact in this case, that the man did try to get there and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court, in our judgment to set aside the judgment, mulcting, in proper cases, the delinquent man in costs. In all those cases, this universal panacea for healing wounds, as it has been called in England, will properly be applied. It is not right in cases of this kind that the man should have his case disposed of without being heard. These Courts are here so that people who have cases can have those cases heard and determined, and it should never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be put right, as far as the other side is concerned, by making the man to blame pay for it." It is notable, that the expression 'reasonable opportunity' used in Section 27 Income-tax Act is also allied

1. *Arunchalam v. Subramma Ayyar* 46 M. 62, 63.

closely to, if not synonymous with, that of reasonable or sufficient cause. It implies that sufficient time should be given to the assessee to comply with the notice issued by the department.¹

Whether there was a reasonable opportunity allowed is a question of law in certain circumstances.²

The burden of proving sufficient cause lies on the assessee.³

Concealed:—Whereon the facts..... the assessee at first shows receipts of interest as loan in his account books, made available to the department but later reverses them and finally closed the loan account in the assessment year but does not show the receipts in the previous year; held that it was not necessary for him to show the receipts when the account was finally closed and that, therefore, he is not guilty of having concealed his income and as such not liable to pay penalty .⁴

Deliberately:—The use of the word 'deliberately' gives a latitude to the assessee. The burden of proving deliberate intent obviously be on the department. Accidental mistakes, of course, are not penalized by law. Penalty may be levied for filing an incorrect return deliberately even where the subsequent return is correct and assessment is made thereon."⁵

Profits or Capital – These would be the profits or capital as determined according to the Rules laid down in the schedule I & III to the Act.

(a) The amount of Excess Profits Tax payable:—There was a motion in the Assembly to reduce the amount to one-fourth and to fix the maximum limit of penalty to be Rs. 10,000. It was said 'Under clause 16, certain penalties are provided

1. *Sachidanand Sinha v. Commissioner Income-tax B. & O.* 1 I. T. C. 352 : 3 P. 664.

2. *Ibid.*

3. *Abdul Bary v. Commissioner Income-tax, Burma* 5 I. T. C. 352 : 194.

4. 9 I. T. C. 12 : 1936 All. 272 : 1936 I. T. R. 189.

5. *Arunachalam Chettyar (A. R. M. A. L. A. v. C. I. T. Mad.* 6 I. T. C. 58.

for two acts. One is, if, without reasonable cause the assessee fail to furnish the return required, under sub-section (1) of Section 13, and the other relates to furnishing deliberately inaccurate particulars, profits or capital. Under these circumstances it is laid down that in the first case the penalty proposed to be levied is the amount of excess profits payable, and, in the other cases, he is liable to penalty of the amount of excess profits tax which would have been avoided if the returns had been accepted as correct. Then, further on in sub-clause (2) of this Section, an attempt to avoid the prosecution for an offence is made. It has not, however, been made clear whether the offence under any other penal law of the country, will be applicable or not. This was the discussion this morning in relation to another clause, and I understand that the Government are willing to make it more clear than it is at present in clause 2. My amendment refers to this that the maximum penalty should be fixed as one fourth of the excess profits tax and that too should exceed the limit of ten thousand rupees as a maximum. I know that it is not always the maximum that is imposed in all cases. The discretion is left. The circumstances of the case govern the penalty that is levied. But, taking all the circumstances into consideration one fact is clear that ten thousand rupees is sufficient penalty for any such negligence or offence which may be discovered later on by the taxing officer. I suggest, therefore, that in the circumstances the majesty of the law will be fully vindicated by the maximum penalty being at rupees ten thousand.'

On an opposition the motion was negatived. Another motion to reduce the penalty to one half was also negatived.

(b) **Return Made** :—These words mean a return made by the assessee himself. At least, this is the interpretation put on similar words, 'returned by such person' used in Section 28 Income-tax Act. Consequently, a return filed by an agent of assessee has been held not to be binding on him and the

penalty levied in such a case has been held to be improper. ¹

Profits, like income, would mean profits net after due deductions, hence where a deduction not allowable is claimed, it is a case for penalty.

All the above cited case law has been taken from Section 28 Income-tax Act, 1922 (as amended 1939) and must apparently held good in case of Excess Profits Tax also, the provisions of which in Section 16 are nearly the same as those of Section 28 Income-tax Act, and involve the same principles.

Proviso :—This proviso is the same as sub-section (6) of Section 28 Income-tax Act. It has been newly added to the latter Section by the 1939 Amending Act. With regard to this the Enquiry Committee observed :—"To prevent indiscriminate or vexatious use of these powers, we recommend that the power of imposing these penalties which is vested in the Income-tax Officer should only be exercised by him, in the case of a penalty exceeding say Rs. 1,000, after obtaining prior sanction from his Inspecting Officer."

Section 17. (1) *Any person aggrieved by a decision made in pursuance of Section 8, or objecting to the amount of excess profits tax for which he is liable as assessed by the Excess Profits Tax Officer or denying his liability to be assessed under this Act, or objecting to any penalty imposed by the Excess Profits Tax Officer, or to the amount of any deficiency of profits as assessed by the Excess Profits Tax Officer, or to the amount allowed by the Excess Profits Tax Officer by way of relief under any provision of this Act or to any refusal by the Excess Profits Tax Officer to grant relief may appeal to the Appellate Assistant Commissioner :*

Provided that no appeal shall lie against a determination of the amount of the profits of any standard period where those profits have been determined in accordance with the first proviso to rule 1 of the First Schedule except in respect of adjustment made under the provision of that Schedule :

1. S. Mohd. Mehdi v. Commissioner Income-tax, U. P. & C. P. S I. T. C. 211: 1935 Oudh 508 : 1935 O. W. N. 490 1935 I. T. B. 201.

Provided further that no appeal shall lie under this Section against any appointment made by the Excess Profits Tax Officer under the proviso to sub-section (5) of Section 8 or against any decision of the Board of Referees under sub-section (9) of Section 6.

(2) *An appeal shall ordinarily be presented within forty-five days of receipt of the notice of demand relating to the assessment or penalty objected to, or in the case of an appeal against the assessment of a deficiency of profits, within forty-five days of the receipt of the copy of the order determining the deficiency, or in the case of an appeal against the amount of a relief granted or a refusal to grant relief, within forty-five days of the receipt of the intimation of the order granting or refusing to grant the relief, but the Appellate Assistant Commissioner may admit an appeal after the expiration of that period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.*

(3) *An appeal shall be in the prescribed form and shall be verified in the prescribed manner.*

(4) *The Appellate Assistant Commissioner shall hear and determine the appeal and, subject to the provisions of this Act, shall pass such orders as he thinks fit, and such orders may include an order enhancing the assessment or a penalty :*

Provided that an order enhancing an assessment or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) *The procedure to be adopted in the hearing and determination of appeals shall be in accordance with the rules made in this behalf by the Central Board of Revenue.*

Previous Law : — Section 8 Excess Profits Duty Act of 1919.

Analogous Law :—(1) *Indian :—*Sections 30 and 31 Income-tax Act 1922 (amended) 1939.

The provisions of sub-section (1) to Section 17 are nearly the same as of Section 30, Income Tax Act, 1922 (amended 1939) *mutatis mutandis* sub-section (4) and (5) contain provisions similar to Section 31 of Income Tax Act, briefly put.

English Section 21 Finance Act, 2 of 1939.

The Regulations dated the 30th November, 1939 made are as under :—

1. Subject to the express provisions of the Act and these regulations, the enactments of the Income-tax Act, 1918, and Finance Act, 1925, enumerated in the Schedule to these Regulations shall, with the modifications therein described, apply to the assessment and collection of excess profits tax, and the hearing of appeals in connection therewith.

2. Notice of assessment shall be served on the person charged or the person in whose name he is charged.

3. A notice of assessment or a notice requiring a return under the Act may be delivered to the person on whom it is intended to be served, or served upon him by post.

Service by post in this regulation shall have the same meaning as in the Interpretation Act, 1889.

4. Any person dissatisfied with any assessment made upon him may at any time within 30 days from the date of service of the notice of assessment, or within such further time as the Commissioners of Inland Revenue may allow, give notice to the surveyor named in the notice of assessment of his intention to appeal against the assessment, and every such notice shall specify the grounds of appeal and in England, Scotland and Wales, whether the appellant desires that the appeal shall be heard by the General Commissioners or the Special Commissioners. Provided that if on the hearing of the appeal the appellant desires to go into any ground of appeal which was not specified in the notice and the omission of that ground from the notice was, in the opinion of the Commissioners hearing the appeal, not wilful or unreasonable, those

Commissioners shall not be precluded from allowing the appellant to go into that ground or taking it into their consideration.

5. With reference to any notice of appeal and to the hearing of an appeal, the General or Special Commissioners, as the case may be, shall subject to the provisions of the Act and to any Regulations made thereunder, have all such powers in relation to any matter of appeal as are possessed by them in relation to notices of appeal and the hearing of appeals under any Act for the time being in force relating to income-tax. The General or Special Commissioners shall certify in writing to the appellant and to the Commissioners of Inland Revenue, after determining any appeal, their decision and the amount, if any, by which any assessment has been thereby altered.

6. The Commissioners of Inland Revenue may be represented at the hearing of an appeal by any person nominated in that behalf by them and any person so nominated shall have the same powers with reference to appeals as may for the time being be exercised by a surveyor with reference to appeals relating to income-tax.

7. A Surveyor may for any purpose in connection with the assessment and collection of tax and the hearing of appeals make use of, or produce in evidence, any returns, correspondence, schedules, accounts, statements or other documents to which he has had or may have lawful access for the purposes of income tax or national defence contributions, and shall have the same right to examine all accounts, schedules and statements furnished to the General or Special Commissioners as he has in the case of appeal relating to income-tax.

8. Any barrister or solicitor or member of an incorporated society of accountants may be heard by the General or Special Commissioners on appeal.

9. No Commissioner interested in his own right or in the right of any other person in any matter under appeal shall take part in or be present at the hearing or determination thereof.

10. Any notices required to be given to the Commissioners of Inland Revenue may be given either to the Commissioners at their principal office in London or to the Surveyor acting for the district in which the person giving such notice resides or carries on business.

11. In these Regulations, unless the context otherwise requires, the expression 'surveyor' means a surveyor as defined by the Income Tax Act, 1918, and the Act' means the Finance (No. 2) Act, 1939.

Scope Section 17.—Section 17 deals with appeals against assessment to Excess Profits Tax. Other allied matters, *i.e.* determination of liability to the tax or penalty imposed under Section 13 or the amount of deficiency (under Section 7) or relief allowed or refusal to allow the same are all covered by the Section and appeal would be to the Appellate Assistant Commissioner in all such cases also.

In connection with the question of hearing of appeals by Assistant Commissioners and the suggestion of creating a tribunal, the matter was dealt with at large by the Enquiry Committee. Ultimately, the said Committee suggested the hearing of appeals by Appellate Assistant Commissioners.

They observed :—"We agree, however, with those who, while pressing for a tribunal as an alternative to the Assistant Commissioners, conceded that their objections to the present system would be largely met by taking away all administrative duties from Assistant Commissioners having appellate jurisdiction. Such a course would also meet the Departmental objection that on points of difficulty the Income-tax Officer is unable to consult his superior officer. We recommend, therefore, that the Assistant Commissioners, exercising appellate functions should have no administrative duties and that the Income-tax Officers should be controlled by Assistant Commissioners acting as 'Inspecting Officers' having no appellate functions.

Given this separation of the functions Assistant Commissioners, we consider that the Income-tax Officer should have the right to consult his inspecting Officer openly and if necessary,

to obtain instructions from him before making an assessment. The Department should also have the right of being represented at the appeal before the Assistant Commissioner or before the appeal Tribunal, although the right need not be exercised in all cases. It would be undesirable however, for Departmental references, including instructions from the Commissioner to be placed before the Assistant Commissioner hearing appeals, since the latter should be absolutely free to give his unfettered decision."

Section 17, sub-section (1) enumerates the specific rules of Excess Profits Tax Officers against which an appeal lies. Orders not mentioned therein would not automatically be appealable and would be final, not being liable to be re-opened at any subsequent stage. 1

This is the rule of law and the general principle followed under Section 30 Income-tax Act and it must be applicable here also.

Once an appeal has been presented the assessee has no option or power to withdraw the same, just as he can do under the Civil Procedure Code. The Act being a special piece of legislation is self-contained, except in and for as it relates to certain provision of the Income-tax Act made applicable to it, (see Section 20 *post*). It is based on the principle that the power under the rules of law relating to appeals would be negatived if the assessee could withdraw the appeal at any time, apprehending an enhancement of assessment. 2

The two provisos to sub-section (1) contain provisions peculiar to the Act itself, apart from the generality of the other provision. The limitation, the form and verification and the procedure at hearing, being the necessary incidents of an appeal, have all been duly provided by the Section.

While the hearing of appeal forms the subject of a

1. *Haji Ali Jan v. Commissioner Income Tax Punjab* 7 I. T. C. 572 : Lah. 621.

2. *Commissioner Income-tax, Punjab v. Nawab Shah Ngwaz Khan* 1938 Lah.741.

distinction of Section (31) under the Income-tax Act, sub-section (4) and (5) cover this field of the subject.

Sub-Section (1):—This sub-section specifically enumerates the orders of the Excess Profits Officer against which an appeal lies.

Proviso 1:—This proviso specifically exempts from appeal an order of determination of standard profits under proviso to Rule 1, Schedule 1 of the Act.

An appeal against such an order lies only or to adjustment.

Computation of standard profits under Rule 1 Schedule I is based on the principle contained in Section 10, Income-tax Act. See notes under Rule 1 Schedule 1 *post*.

Proviso 2:—This proviso covers two other specific matters *i.e.* an apportionment made under Section 8 (5) proviso. This relates to transfer of a part of business as going concern and the apportionment to be made consequent thereon, of the profits, losses capital etc., by the Excess Profits Tax Officer.

Sub-section (2) This sub-section prescribes the time or limit for filing an appeal which is forty-five days, time being computed from the date of notice of demand or receipt of copy of order in deficiency and other case. In the Bill as presented the time limit was thirty days. The time was extended¹ to forty-five days by the Select Committee. Although the word 'ordinarily' has been held to mean that there is nothing to prevent the above time of forty-five days being extended, still there are express words added at the end of the Section enabling the Appellate Assistant Commissioner to extend the time in cases of sufficient cause for delay in filing the appeal being shown. 'Sufficient cause' will have the same meaning here as are assigned to the words under Section 27 Income tax Act, (see notes under Section 16 *ante*).

After the Expiration of Period:—Powers of extension of time in appeals has been universally recognized in all cases.

I. Mitchell and others v. Mitchell 1927 Cal. 518.

Section 5 Limitation Act contains a general provision as to it, being applicable and made applicable to almost to all matters, where appeal is prescribed. The provision is based on justice and equality. The power to admit an appeal is discretionary where additional grounds of appeal are filed. These have been held to date back to the date of originally filed appeal, of which the additional grounds when filed become a part.

The additional grounds of appeal were ordered by the Chief Court to be admitted after the prescribed period. The following observations of the Court in the case are well worth quoting:—"It may be noted that O. 41, R. 2, Civil P. C., provides that the appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal. The object of this rule clearly is to give notice on the ground of objection to the opposite party. There is no such rule to be found in the Income-tax Act or in the rules framed under Section 59 of that Act. It may well be that there is not the same need for stringency in the case of appeals under the Income-tax Act, because there is no question of notice being given to any officer of the Crown, as we understand that the Crown is never represented by any officer at the hearing of appeals by Assistant Commissioner. This consideration lends some support to the argument urged on behalf of the assessee that he could, as a matter of right, raise additional grounds at any time before the hearing of the appeal. Even if this is not so, we have no doubt that the Assistant Commissioner could admit the additional grounds in the exercise of his discretion. It is also a rule of general law that when a Court is allowed discretion in any matter, the discretion must be exercised in a judicial manner, and not capriciously or arbitrarily. It was further observed:—"It is also well-settled that the proper or improper exercise of discretion in the question of law, if, therefore, the Assistant Commissioner has exercised his discretion in refusing to entertain the additional grounds in an improper manner; the discretion must be open to correction. We are inclined to think that the Assistant Commissioner exercised his discretion in refusing to admit the additional grounds of appeal mainly because he was of opinion that the

application for filing additional grounds of appeal was governed by the 30 days' rule of limitation laid down in Section 30 (2) of the Act. We are definitely of opinion that this view is incorrect. In the present case the original appeal was admittedly filed within the prescribed period of limitation. The law does not contemplate to appeals against the same order. One appeal having already been filed, the application for the consideration of additional grounds of appeal cannot in any sense be regarded as an appeal governed by the rule of limitation laid down in Section 30. There is no rule of limitation prescribed for filing additional grounds. Such grounds date back to the date of the original appeal, of which when admitted, they become a part. The additional grounds of appeal can, therefore, be filed at any time before the appeal is decided. The Assistant Commissioner was, therefore, quite wrong in holding that the additional grounds could not be allowed to be raised after the period prescribed for the filing of the appeal had expired. We would also note that the additional grounds were intended to question the principle on which the assessment had been based by the Income-tax Officer. The objection raised in these grounds went to the root of the assessment". Then Their Lordships concluded: "The position of the Income-tax authorities is delicate and a difficult one. They have to levy the tax, and at the same time to decide judicially objections raised by the assessee. In such circumstances it is their duty to act with the utmost fairness to the assessee so as to give them no ground for complaint. If an objection of this nature comes to their notice, they are expected to examine it fairly on its merits, and not to take refuge behind any technical defect in the manner in which the objection is raised.

Sub-section (3):—Appeals are usually on prescribed form, the same being prescribed by the Rules of procedure. There is for the usual verification also, to be specified by the Rules. The term shall be presented means "shall be presented". An appeal may be presented by the assessee or by his agent (or even by post). Under recent Amendment Act, 1939, the appeal lies against the order under Section 23 (4), therefore, the following case law is now unnecessary:—

When a document purporting to be an appeal under

Section 5 Limitation Act contains a Section 30 is filed against an assessment purporting to have been made under sub-section (4) of Section 23, it should be admitted as an appeal in Bihar and Orissa (see *Kunwarji Anand* 5 I. T. C. 417) elsewhere, it should be treated as an *application for the admission of the appeal*. In neither case should the Assistant Commissioner make an *ex parte* order declining to entertain the appeal on the ground that by reason of the proviso to sub-section (1) of Section 30 no appeal lies. The assessee should be given a hearing on the preliminary issue where the appeal lies, and a finding should be recorded on that issue. (The notice giving the assessee an opportunity of a hearing should not be issued in Form Income-tax 18 except in (Bihar and Orissa). The decision on this preliminary issue will depend on whether the assessment expressed to have been made under sub-section (4) of Section 23 was in fact capable of being made under that sub-section. If the decision on this issue is adverse to the appellant, the appeal will be *dismissed* (in Bihar and Orissa or its admission refused elsewhere on the ground that no appeal lies).

The practice of presenting an appeal with written opinion of members of legal profession is to be condemned. Such opinion should be taken off before admitting the appeal (*Maharajdhiraja of Darbhanga v. Commissioner I. T. B. & O.* 1933 I. T. R. 206). Where an appeal is not in the prescribed form nor so verified, it is rightly rejected *in limine*.*

Sub-section (4):—Hearing of appeal. This sub-section relates to the hearing and determination or disposal of appeal. Analogous provisions are contained in Section 31, Income-tax Act, relating to the hearing under the Income-tax Act.

The provisions of Section 31 Income-tax Act are more detailed and specific than those of this sub-section. For instance, there is no specific provision for any further enquiry by the appellate assistant, which it cannot, on principle be said is barred. Apparently the term hearing includes it. In

* *Damodar Pershad v. Commissioner I. T. B. & O* 8 P. 795 : 8 I. T. C. 405.

*Bridhe Mal Lodha v. Commissioner Income-tax U. P.** it has been held that an Assistant Commissioner is not, in the course of hearing an appeal, is confined to the record before him he has the discretion, if he so deems fit, to call for further evidence, though he cannot be compelled to do so.

As to the right of appellant to adduce fresh evidence at the hearing of an appeal he has no higher right than he would have in a civil suit under Order 41, Rule 27, Civil Procedure Code (5 of 1908).¹ There is no error of law in refusing to admit fresh evidence in second appeal before the Commissioner where the assessee in spite of opportunity to produce it before the Assistant Commissioner, did not produce the same there.² Be it noted, however, that while the scope of letting in fresh evidence under Order 41 Rule 27 C. P. Code limited, being available only in certain cases, the power of Assistant Commissioner on the Income-tax side on the matter is less fettered, a wider discretion being given to them [sub-section (2) to Section 31]. This was the view taken in the case of *Birdhe Mal Lodha* just cited above, by the Allahabad High Court. In the matter of letting in evidence, however, the Assistant Commissioner, like the Income-tax Officer is not bound of the strict technicalities and the letter of the law of evidence as laid down in the Indian Evidence Act, see notes under Section 23 *supra* on the point.

An important point in connection with the hearing of appeals that at times arises, is this. Under O. 41, R. 17, C. P. Code of 1908, if 'the appellant does not appear when the appeal is called on for hearing, the Court *may* make an order that the appeal be dismissed. Under the former Code, the Court was bound to dismiss the appeal but under the present Code, it is *not bound* though it *may*.³ This applies to adjourned hearing also.⁴

* 1934 All. 217.

(1) *E. M. Chettyar Firm v. Commissioner I. T., Burma* : 7 R. 635 : 1934 Rang. 4 : 4 I. T. C. 111.

(2) *Ibid.*

(3) *Basudev v. Bideshi* 6 R. 612 : 1929 Rang. 11 (12) *Taher Sheikh Chowkidar v. Otaruddi Howldar* 56-C 412 : 1929 Cal. 476, *Musalirakhath Muhamas v. Manavikrama Zamorin Raja Avergal* 1923 Mad. 13 (14) : 45 M. 882.

(4) *Gangadhar Keshawa v. Ramchandra* (1894) 7 C. P. L. R. 1 (2).

The Allahabad ¹ Calcutta ² Madras ³ and Rangoon. ⁴ High Courts have interpreted it to mean that the Court should adjourn it to another date. The Appellate Court may take up appeal, *at any time or hour of the day fixed for hearing*, when the assessee may not be present. It may be taken up before the usual Court hours, at times. In such a case, if the assessee appears in due time, in the course of the day, and the Court refuses to hear him, the Court acts with grave irregularity ⁵ On the same principle, if an assessee's appeal is taken up at any time, in the course of the usual Court business hours, when he happens to be absent, but when he appears *in due time* (i.e. Court time), in the course of the day, (either in person or by representative) and is ready to proceed with the appeal, but the Court refuses to hear him, it also acts with irregularity. The implication is that, if the appellant appears, *at any time during the Court hours, on the date fixed for hearing* he must be given a hearing. It is desirable to accommodate litigants to some extent if their pleaders happen to be absent in another Court and have a chance of attending within a short time so as not to disturb the business Court. ⁶

Determine the appeal:—It means the same 'disposal' in Section 31 Income tax Act. An Assistant Commissioner must, in disposal of an appeal, state facts and give reason for his decision. ⁷

A contrary view was, however, taken in a Rangoon case. ⁸

Subject to the provisions of this Act:— These qualifying orders are wide enough to include all restrictions and limitation on Excess Profits Tax Assessment and other matters, which may form the subject of an appeal under Section 17 (1). See also notes under Section 18 *post* (1).

(1) *Nasir Khan v. Itwari* 1924 All. 144.

(2) *Taher Sheikh v. Otaruddi Howlader* 1929 Cal. 475 (476).

(3) 1928 Mad. 13 (14): 46 M. 882 (cited *supra*).

(4) 1929 Rang. II: 6 R. 612 (do).

(5) *Hakeemunissa v. Muddoonum* 1 South W. R. 246.

(6) *Ramdhan v. Bishnu Prasad* (1920) 54 I. C. 715: 5 Pat L. 917.

(7) *Ram Pratap Sukhlal v. C. I. T.*, Pb. 3 I T.C. 362.

(8) *E. M. Chettyar Firm. v. C. I. T., Burma* 7 H. 635: 1930 Ran. 224: 4 I. T. C. 111.

Such orders as he may think fit:—These words are too general and comprehensive as compared with the explicit provision contained in Section 31 (3) (1) Income-tax Act, which are 'confirm', 'reduce', 'enhance' the assessment and in the case of an assessment of firm etc.

Only an order enhancing an assessment has been specifically mentioned, in this sub-section.

Sub-section (5):— This sub-section relates to procedure at the hearing of an appeal, which is to be governed by the Rules and the subject to be formed by the General Board of Revenue.

Section 18. (1) *Any person objecting to an order passed by an Appellate Assistant Commissioner imposing on him a penalty under Section 16 or enhancing his assessment or enhancing a penalty under Section 17 may appeal to the Commissioner within thirty days of the date on which he was served with notice of such order.*

Appeal to
Commissioner
against
Appellate
Commissioner's
orders,
imposing
penalties or
enhancing
assess-
ments or
penalties

(2) *In disposing of the appeal the Commissioner may, after giving the appellant an opportunity of being heard, pass such orders thereon as he thinks fit.*

(3) *On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, this Section shall cease to have effect.*

1. Legislative Changes:—This Section has been added by the Select Committee. The Committee observed:—"We have made provision on the lines of Section 32 of the Indian Income-tax Act, 1922 for appeals to the Commissioner against certain orders made by an Appellate Assistant Commissioner. The provision will cease to be necessary when the Appellate Tribunal provided for by Clause 18(now 19)comes into operation".

There was a motion in the Assembly to add a provision providing for appeal to the High Court from the decision of the Commissioner within 30 days. "In this Bill, it is provided that from the decision of an Income-tax Officer, there will be an appeal to an Appellate Assistant Commissioner and from his

decision an appeal to the Commissioner. Now, Sir, an Appellate Excess Profits Tax Commissioner as well as Excess Profits Tax Commissioner belongs to the department which is under the Central Board of Revenue. This Board of Revenue is a tax collecting or tax gathering department. Therefore, all these officers look at the question from the angle of vision of the tax gatherer. Besides, the pay, promotion and prospects of these officers depend upon the good wishes of the Board of Revenue. So long as the Board of Revenue decides the claims of promotion, etc., all officers will naturally look at this question from the point of view of the amount of revenue which is realized.

Therefore, it is desirable that an appeal should lie to an independent authority.

As regards income-tax, a tribunal is to be set up, but it has not yet been done. Probably it will be set up a year hence. Now, during that time there will be no real appeal to a Court of justice. I desire to emphasize the necessity of appeal to a Court of justice. The High Court is the most competent Court to take up these appeal cases". (*P. N. Banerjee*).

The motion was opposed:— 'May I start by saying that, in so far as questions of law in income-tax matters are concerned, there is a right of reference to the High Court under Section 66 of the Indian Income-tax Act, and that the provisions of Section 66 of that Act are brought into this Bill under clause 21, so that there will be a right of reference to the High Court on questions of law. In Income-tax matters, there is no right of reference to the High Court on questions of fact and the attitude on this is the same in this country as in other countries, because it is deemed to be inappropriate to take questions of fact as distinct from questions of interpretation to the High Court. Questions of fact can be subject to appeal, first of all, to the Appellate Assistant Commissioner. The Honourable Member suggested that the Appellate Assistant Commissioner would in all cases be prejudiced against the assessee because his prospects of promotion would depend upon the amount of revenue he obtains for the Government or the amount of revenue which he prevents the Governments from losing

under appeals.....I should like to say, first of all, that attitude is not the attitude of persons responsible for making promotions of Appellate Assistant Commissioners, who are very senior officers of the Department. The new Income-tax Act gives very wide powers, and it is specifically provided under Section 5 of the Act that no orders of the Central Board of Revenue may interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions. That is being put in order to make it quite clear that the Appellate Assistant Commissioner should act judicially and should not have the interest of revenue in mind. He should get the correct result and not merely try to over-assess.

Then, Sir, as to the setting up of an appellate Tribunal ; one must be set up before the 1st April next year. An undertaking has been given, and I think it is stated in the Select Committee Report that it would be set up as soon as possible" (*Mr. S. P. Chambers*).

The motion was negatived.

2. Previous Law:—Section 8, Act 10 of 1919 contains similar provision. Appeals under Section 8, Excess Profits Duty Act, 1919 from the decision of the Assessing Officer, the Collector lay to the Chief Revenue Authority which, at the option of the appellant decided the same itself or referred it to the Board of Referees.

3. Analogous Law:—(a) The administration machinery in the United Kingdom is entirely different. The assessing authorities in the matter of Excess Profits Tax are the Commissioners Inland Revenue, from whose decision appeal is heard by Special Commissioners. In this connection See Section 21 (2) proviso cited under the preceding Section 17.

Then, there is a reference on a case stated to the High Court (King's Bench Division) Appeal from the latter's decision lies to the Court of Appeal and thence finally to the House of Lords.

(b) Indian Law:—Section 32 Income Tax Act (1) (8) 1922.

Scope of Section 18:—Section 18, added by the Select Committee makes provision for a second appeal to the Commissioner Income-tax in certain matters therein enumerated. It follows the line of Section 32, Income-tax Act, 1922 (amended 1939).

By sub-section (3) the age of the Section is limited to the date of coming into operation of Part II, Indian Income-tax Amendment Act, 1939 after which the Section will be inoperative. Part II relates to the setting up of a tribunal to hear appeals in income-tax matters.

With regard to this the Select Committee observe:—"We desire to record our view that every effort should be made to accelerate the setting up of the Appellate Tribunal constituted under the Indian Income-tax Act, 1922, and that it would, if possible, be brought into existence by the 1st day of October, 1940."

Section 19. *(1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any Excess Profits Tax Officer or Appellate Assistant Commissioner subordinate to him, and on receipt of the record may make such enquiry, or cause such enquiry to be made, and, subject to the provisions of this Act, may pass such orders thereon (including an order enhancing an assessment) as he thinks fit :*

Provided that he shall not pass any order prejudicial to a person to whose business this Act applies without hearing him, or giving him a reasonable opportunity of being heard.

(2) On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, sub-section (1) shall cease to have effect, but thereafter any Excess Profits Tax Officer or any person in respect of whose business an order under Section 14 has been passed who objects to an order passed by an Appellate Assistant Commissioner under Section 16 or Section 17 may, within the prescribed time and in the prescribed manner, appeal against such order to the Appellate Tribunal constituted under the Indian Income-tax Act, 1922, and that Tribunal shall

have all such powers in disposing of the appeal as it has in respect of appeals preferred to it under the Indian Income-tax Act, 1922.

1. **Previous Law:**—No Excess Profits Duty. Such provisions existed in the Excess Profits Duty Act of 1919.

2. **Analogous law:**—Income-tax Act, 1922 Section 33.

3. **Scope:**—Section 19 contains provision as to the powers of revision by Commissioner. These provisions are similar to those contained in Section 33 Income-tax Act. Section 33 (Income-tax Act) enables the Commissioner of his own motion to call for the record of any proceedings under the Act, and after an enquiry, to pass, subject to the provisions of the Act, such orders as he thinks fit. The same are the provisions of Section 18 of Excess Profits Tax Act. The power under Section 33 Income-tax Act is that of revision or superintendence* and for purposes of initiating proceedings of reassessment. Section 33 of the Act is subject to the provisions of Section 34 of the Income-tax Act and the Commissioner has no right of initiating or independently starting re-assessment proceedings.¹ Even though no limitation of time is prescribed for interference by way of revision under Section 33, the Court would almost always incline in favour of taking the view that such exercise of power should be within a reasonable time of the proceedings sought to be revised, reasonable time being computed by the Court having regard to all the other provisions of the Act, to the facts of the particular case and the special feature, if any, in it.² The powers of review under Section 33 can be exercised by the Commissioner during the pending of an application under Section 66 (2) as is shown by the proviso to the latter Section, [*Chettyar (C.T.V.S.) firm v. Commissioner I.T. Mad.* 4 I.T.C. 160]

Sub-section (2) of Section 19 Excess Profits Tax Act, contains new proviso. These are apparently based on the observations of the Enquiry Committee in connection with other establishment of an appellate Tribunal which are:—

* Abdul Kadir v. Commissioner Income-tax, Madras 2. I.T.C. 357 (379) 1928 Mad. 254.

(1) *Ibid* 380.

(2) " 379.

"Since the Income-tax Officer is given the right of appeal to the Appeal Tribunal against the decision of an Assistant Commissioner, we are of opinion, that it should become less and less necessary for the Commissioner to use his power of enhancing an assessment under Section 33. We recommend that in cases in which he discovers an under-assessment, he should as far as possible instruct the Income-tax Officer to proceed under Section 34. The power of *reducing* an assessment under Section 33 should also, we think, be retained for the present, although, with appealability of assessments made under Section 23 (4) and the right of appeal to the Appeal Tribunal, the use of the power should in practice diminish, and be confined to the exceptional case of hardship in which other remedies are not open.

4. **Sub-section (1) "May"**:—The use of the word 'may' shows the discretionary nature of the power under the Section.

5. **"Of his own motion"**:—While the Commissioner may act *suo motu* that obviously does not debar an aggrieved party from moving the Commissioner to take action under this Section. That is the usual principle and practice of law in matters of revision, as is indicated by the corresponding provisions in other enactments (*e.g.*) C. Procedure Code 5 of 1908 the word used being 'may' *either of its motion or on the application of*. The same meaning may be taken to be implied here obviously enough the right of appeal is not interfered by this provision.

6. **Any proceedings**:—It is not only the assessment proceedings but any and every proceedings under the Act that are liable to revision by Commissioner under this Section.

7. **Enquiry**:—The word 'enquiry' must have the same important meaning here as under Section 33 Income-tax Act. Under that Section the Commissioner need not make a personal enquiry, if any enquiry is necessary before exercising his power of revision. He may cause an enquiry to be made by a subordinate officer. ¹ In a Bombay case, *Income-tax Commissioner, Bombay v. Bombay Trust Corporation Ltd.* ² the point involved was one of assessment of a Foreign Colony under Section

(1) Para 104 (iii) I. T. M.

(2) 1936 P. C. 269 : 1936 I. T. R. 323.

43 through an agent. The Commissioner, moved under Section 66, exercised his powers of review under Section 33 and directed further enquiry. With regard to his powers of enquiry under the Section, their Lordships of the P. C. observed:—"Under Section 33 (2) he has a general power to make inquiry or to cause an inquiry to be made. It was certainly unfortunate that his order for further inquiry took the form of quoting the power given to Assistant Commissioner by Clause (b), sub-section 3, Section 31. That is one of several powers mentioned in the sub-section each of which is to be used in a proper case. As the whole question at issue was whether or not the Hong Kong Company, or the Bombay Company as its agent, were liable to be assessed at all, to direct the Income-tax Officer to make a fresh assessment after making such further inquiry as he thought fit was an inappropriate form of order. But in substance the Commissioner was within his rights in directing further inquiry, and, however, disappointing this course may have been to the assessee, it is a matter which a Court of Law must leave at the discretion of the Commissioner. The learned Judges of the High Court were not justified in thinking that this part of the order of the Commissioner was open to the criticism that the Commissioner was flouting or ignoring the High Court's decision".

8. Subject to the provisions of this Act :— The expression 'subject to the provisions of the Act' includes the restrictions as to limitation imposed upon the Income-tax authorities. These words leave no doubt.....that the Commissioner is not entitled to pass an order which he himself or another Income-tax authority is not authorised to pass under other provisions of the Act ¹ In *Sheikh Abdul Kadar v. Commissioner Income-tax* ² the Income-tax Officer started proceedings under Section 34 and re-assessed the parties. The order was set aside on appeal by the Assistant Commissioner, on the ground of want of proper service of notice under Section 34. The Commissioner, acting under Section 33, re-assessed the parties, by his order, stating 'I will assume that there was no proper service of notice, but as the Income-tax Officer really commenced proceedings, I shall

(1) *Jessa Ram v. Commissioner I. Tax Punjab*. 2 I. T. C. 842 (844).

(2) 2 I. T. C. 372; 1928 Mad. 257; 54 M. L. J. 298.

under Section 33, take up that proceeding at the stage at which it was left and proceed to re-assess the parties by virtue of the powers vested in me of revision under Section 33 of the Act' Since the condition precedent to reassessment under Section 34 is the service of notice on assessee within one year, intimating him of the intention on the part of the Income-tax Officer to reassess, and in this case as admittedly 'assumed' by the Commissioner, in his order of reassessment, there was no proper service of notice, the High Court held on reference that the Commissioner had no right to initiate *further* or *fresh* proceedings for re-assessment. It was observed:—"The power of revision given in Section 33 is a power merely of revision and such powers cannot be regarded as being larger than the powers of a Court of Appeal. It, therefore, follows so long as the Commissioner did not, in revision, seek to set aside the finding of the order of the Assistant Commissioner with reference to the service of notice, it follows we must proceed on the footing that there had been no valid service of notice within the time under Section 34 of the Act and that, therefore, the condition precedent for reassessment has not been satisfied or complied with."

The Commissioner, could, it was held, raise and set aside under the Section, the order of the Assistant Commissioner and his findings with regard to service of notice. The consequential proceedings and order as to levying of penalty under Section 23 was held also to be illegal in this case). (See also on the point the case of *Newal Kishore Khairati Lall* cited in the succeeding note.) The same view was also taken on the point of registration of a firm more than a year after, in another case by the Judicial Commissioner's Court, Sindh. ¹ In *Ganesh Dass v. Commissioner I. Tax, Punjab* ² also re-assessment made after one year, under Section 34, on the right party was set aside.

9. Proviso—"Order prejudicial to assessee":—An order of a Commissioner declining to interfere with the order passed

(1) *Khemchand Ram Dass v. Commissioner I. T.* 1931 Sindh 46 1984 I. T. R. 216.

(2) 1927 Lah 248 : 3 I. T. C. 316.

by the Income-tax Officer is not an order prejudicial to assessee, as it leaves him where he was. It does not place him in a worse position. ¹ The same has been held to be the order of Assistant Commissioner upheld by Commissioner. ² A Commissioner is not bound to hear the assessee or his representative while hearing such petitions. ³

10. "Reasonable Opportunity":—In the case of *Mr. Sachchidanand Sinha v. Commissioner I.T., B. & O.* ⁴, a week's time was considered not to be reasonable opportunity, specially with regard to the facts of the case, one of them being that Mr. S. Sinha, the assessee, expressly wrote to the Commissioner that it 'would be in the interests of justice if the Commissioner would kindly give him an opportunity of stating his views before he passed any final orders on the subject.' The High Court in accepting the reference and directing an opportunity to be given observed as follows (per *Dawson Miller, C.J.*) "I may say at the outset that where an order is passed by the Commissioner under Section 33 in circumstances such as the present, that is to say, in circumstances where he is really exercising the duties of the Income-tax Officer under an earlier Section namely, Section 23, sub-section (2) of the Act, and is in effect, calling upon the assessee to give evidence to support the original return made by him, then I think that a week's notice or 8 days' notice, as was the case here, is certainly not sufficient time, but it will be observed from Mr. Sinha's letter he considered that he would be given a further opportunity of considering this matter because he said that he would be back in Patna on the 2nd January and he would write to the Commissioner then definitely upon the subject. Therefore, he was certainly under the impression that he would be given a further opportunity of considering this matter and of definitely putting his views before the Commissioner. That opportunity, however, he was never given, because on receipt of his letter which was written on the 20th, the Commissioner passed the order on the 22nd

(1) *Venkatachala Chettiar (N. A. S. V.) v. Commissioner I. T. Mad.* 1935 I.T., 55: 1935 Mad: 829.

(2) *Trimbhak Tolaram* 1938 Nag. 16

(3) *Paya* 104 (v) I.T.M.

(4) 3 P. 664: 1 I.T.C. 381 (388): 1924 Pat 644.

directing the Income-tax Officer to issue a supplementary demand. On the 19th January, the demand having presumably been received, Mr. Sinha wrote to the Commissioner of Income-tax in continuation of his previous letter and said that no assessment had been made recently on his Allahabad house for the purpose of Income-tax and that whilst this was so, the facts and circumstances of the case were not yet fully made known to the Commissioner and Mr. Sinha was not quite sure that this Allahabad house was liable for assessment and he said that it would be in the interests of justice if the Commissioner would kindly give him an opportunity of stating his views before he passed any final orders on the subject. In answer to this the Commissioner wrote back and said that he had finally disposed of the matter on 22nd December and he had no power to review his order and he refused to consider the matter any further."

11. Sub-section (2). On the coming into operation of Part II.—Part II Indian Income-tax Amendment Act 1939 is to come into force on a date to be followed by Central Government which is not to be later than two years from the date of enforcement of Part II Section 1 (2) 1939, Amending Act.

12. Shall cease to have effect:—It is contemplated that the revisional powers of Commissioners would no longer be necessary to be exercised when there is an Appellate Tribunal to hear appeals from appellate orders of Appellate Assistant Commissioner.

13. Any Excess Profits Tax Officer.—In this sub-section the words 'any Excess Profits Tax Officer or any person in respect of whose business an order under Section 14 has been passed,' were substituted for the words 'any person made liable under this Act for payment of Excess Profits Tax or any Excess Profits Tax Officer' at a motion in the Assembly:—"The object of this amendment is to make it possible for the assessee to appeal even where there is no excess profits tax payable. The Bill provides for the computation of deficiencies, and, as originally worded, only the person made liable for the payment of excess profits tax had the right of

appeal. This has now been amended, so that in all cases there is a right of appeal. It is merely a drafting point." (*Mr. S. P. Chambers*). Just like Assessing Income-tax Officer under the Income Tax Act, Excess Profits Tax Assessing Officers are also given powers to appeal to the Tribunal, if they feel degraded by the Appellate Assistant Commissioner's order.

Section 20. *The Commissioner may, at any time, within four years from the date of any order passed whether by himself or by any Appellate Assistant Commissioner or Excess Profits Tax Officer under this Act, rectify any mistake in any evidence recorded during assessment or appellate proceedings, or any mistake apparent from the record and shall within the like period rectify any mistake apparent from the record which has been brought to his notice by a person to whose business this Act applies :*

Provided that no such rectification shall be made having the effect of enhancing the liability of any person unless that person has been given a reasonable opportunity of being heard.

1. **Provision :—**No such provision.
2. **Analogous Law :—**Section 35 Indian Income-tax Act.
3. **Scope :—**Section 20 just like Section 35. Indian income-tax deals with rectification of mistakes and is not to be confounded with Section 18 (corresponding to Section 33 Income-tax Act) relating to revision :—The power conferred upon the Commissioner or Appellate Assistant Commissioner of Income-tax or the Income-tax Officer by Section 35 to rectify a mistake, whether on his own motion, or on the application of an assessee is confined to the rectification of mistakes patent from the facts or documents which were before him when he passed his revisional, appellate or original assessment order, as the case may be. This Section does not confer on the officers general power of review or authorise any assessee to introduce any new facts in connection with the said assessment. An Income-tax Officer should not correct mistake in cases that have been dealt with by the Appellate Assistant Commissioner on appeal or the Commissioner of Income-tax in revision without a reference to

the Assistant Commissioner or the Commissioner of Income-tax as the case may be." ¹

The object of the Section is to allow corrected mistakes such as are apparent from the record *i.e.* obvious or patent mistakes. In a Bombay case under Section 26 of the 1918 Act, (corresponding to Section 35) *MacLeod C. J.* observed:—"That Section only relates to a mistake in the demand of any assessment and cannot enable the discontented assessee who has paid the amount demanded from him, to re-open the question of the assessment. The Section provides for the rectification of mistakes caused by the demand not corresponding to the assessment, and does not provide for an appeal to the Commissioner from the order of the Collector under Section 26 either rectifying the mistake or refusing to rectify a mistake on an application made by the assessee." ² It is thus clear that the Section applies where the 'demand' does not obviously correspond to the 'assessment'. And if, for any reason, the Collector (now the Income-tax Officer) does not allow the application under Section 35, no appeal lies against the order. Nor is the assessing Officer competent to abuse this Section in order to revise his order and re-open the real questions involving matters relating to assessment.

The scope of Section 20 has been widened by the Select Committee by adding the words 'in any evidence recorded during assessment or appellate proceedings' before the words 'apparent from the record'. With regard to this the Select Committee observed:—"We have amended the clause so as to require that the Commissioner must correct a mistake apparent from the record whether detected by himself or brought to his notice by an assessee and so as to give him power to correct a mistake subsequently discovered in evidence recorded in assessment or appellate proceeding.

4. "Commissioner":—Where, in the course of an application for revision under Section 33, an assessee moves the Commissioner on certain points, and the latter discovers

(1) Para. 106 I. T. M.

(2) *The Jubilee Mills Ltd. v. The Commissioner I. T. Bombay* 1925 Bom. 257 : 27 Bom. L. R. 400 : 2 I. T. C. 25.

any mistake covered by Section 35 be cannot proceed under Section 35, inspite of the time-limit prescribed by that Section. ¹ The Court in pronouncing the judgment, in the case above cited, observed :—"Section 35 provides that the Income-tax Officer may, at any time, within one* year from the date of any demand, rectify any mistake apparent from the record of the assessment. This power includes the rectification of a mistake which has the effect of enhancing assessment. The words 'subject to the provisions of this Act' contained in Section 38 leave no doubt in our minds that the Commissioner is not entitled to pass an order which he himself or another Income-tax authority is not authorised to pass under the other provisions of the Act. In the absence of an express provision enabling the Commissioner to pass orders prejudicial to an assessee without any limit of time, we are of opinion that his powers are subject to the same restrictions as those of an Income-tax Officer under Section 35, which clearly, provides that an Income-tax Officer is not entitled to rectify a mistake to the prejudice of an assessee after the expiry of one* year from the date of the demand. Even if the case be governed by Section 34 which enables an Income-tax Officer to re-assess income, profits or gains when they have escaped assessment or have been assessed at too low a rate, the same remarks would apply *mutatis mutandis*, as under that Section also the powers must be exercised within; one; year. We are, therefore, of opinion that the expression 'subject to the provisions of this Act' includes the restrictions as to limitation imposed on other Income-tax authorities and consequently the rectification of the mistakes in this case to the prejudice of the assessee after the expiry of one year from the date of the demand made upon the assessee was not authorised by law. To hold otherwise would mean that there is no limit to the Commissioner's power to reopen and alter assessment to the prejudice of an assessee, a position that the Legislature could not have contemplated. The fact that the assessee had moved

(1) *Jessaram v. Commissioner I. Tax*, Punjab 8 L. 267 : 20 P. L. R. 212 9 L. L. J. 373 : 1921 Lah. 421 : 2 I. T. C. 842 (844).

* Now four years.

† Now four or eight years.

the Commissioner under Section 33 would not, in our opinion, make any difference because the question of rectification was not covered by his petition.

5. **May** :—‘May’ here implies that the Commissioner has the discretion, of his motion, or *suo motu*. The contrast to this is the latter portion of the Section where the word ‘shall’ is used. See notes below.

6. **Within four years** :—The Amendent Act 1939 extends the period from one year to four years. The following case law may be read in the light of amendment. The period of one year does not run from the date of the notice of original demand but from the date of the revised demand, either under Section 34, or one after appeal or revision, the term ‘demand’ having been held to apply to a determination of the sum or extra sum to be payable to the assessee in such a manner as to bind the assessee. ⁽¹⁾

7. **And shall, within like period**.—In contrast with the word ‘may,’ used in the earlier portion of the Section, whereby discretion is given to the Commissioner to rectify a mistake *suo motu* the word used here is ‘shall’. It means that if an application is made to the Commissioner by any person, the profits of whose business it is sought to assess, it is the bounden duty of the Commissioner to rectify the mistake brought to his notice by such person.

The contrast is noticeable. The former portion of the Section relates to rectification of mistakes by Commissioner on his own motion and the latter to the one where a party lays the mistake to his notice and seeks to have it rectified.

Proviso :— The proviso on the rudimentary principle of law that no one shall be proceeded against unheard. It is but fair and just that a reasonable opportunity should be given to the person whose liability would be affected in the shape of enhancement by the rectification sought to be made.

“Reasonable Opportunity” :— The term ‘sufficient cause’ as used in Section 27 Income-tax Act, though not synonymous with ‘reasonable opportunity’ is practically the same. In fact,

(1) *Per Rankin C. J. in Tricumchand Dan Singh v. The Chief Revenue Authority. Bengal 2 I. T. C. 486 (489) 32 C. W. N. 237.*

the same words are used in Section 27 also see notes under Section 16, on 'reasonable cause', *ante*. The expression 'reasonable opportunity' implies that sufficient time should be given to assessee to comply with the notice issued by the department. ¹ Whether there was reasonable opportunity allowed in a particular case in ordinary question of fact, though in certain circumstances it may become a question of law. ²

Section 21. *The provisions of Sections 4A, 4B, 10, 13, 24B, 29, 36 to 44C (inclusive), 45 to 48 (inclusive), 49E, 49F, 50, 54, 61 to 63 (inclusive), 65 to 67A (inclusive) of the Indian Income-tax Act 1922, shall apply with such modifications, if any, as may be prescribed, as if the said provisions were provisions of this Act and referred to excess profits tax instead of to income-tax, and every officer exercising powers under the said provisions in regard to income-tax may exercise the like powers under this Act in regard to excess profits tax in respect of cases assigned to him under sub-section (3) of Section 3 as he exercises in relation to income-tax under the said Act :*

Provided that references in the said provisions to the assessee shall be construed as references to a person to whose business this Act applies.

Previous Law :—Section 15 Excess Profits Duty Act, 10 of 1919.

Analogous Law :—Schedule 7, Part Adaptation of Income-tax Principles as to computation of profits Part 1-13. Finance Act, 1937 Fourth Schedule. Part II, Paras, 3, 4 and 7 also contain same similar provisions.

Scope of Section 21 :—By Section 21, certain provisions contained in the Income-tax Act, 1922, have been made specifically applicable to the Excess Profits Tax Act. They are to be read as part of this Act, *mutatis mutandis* with modifications prescribed by the Rules under this Act.

These provisions are Section 4A and 4B—Residence in British India and Ordinary residence.

¹ *Sachchidanand Sinha v. Commissioner Income-tax* B. & O. 11 T.C. 352 : 3 Pat. 664.

² *Id.*

Section 10. :—Relating to business, including deductions under this head.

Section 13. :—Relating to method of accounting.

Section 14-B. :—Tax of deceased person payable by representations.

Section 19. :—Notice of demand.

Sections 36 to 44 C. (inclusive).

Section 36. :—Tax to be calculated to nearest anna.

Section 37. :—Power to take evidence on oath enforcing attendance of persons as notices compelling production of documents and issue of summons for examination of witness (proceedings to be judicial proceedings)

Section 38. :—Power to call for information in certain cases i. e. firm, Hindu Undivided family, trustees, guardians or agents etc.

Section 39. :—Power to inspect register of members of the company.

Section 40. :—Relates to liability in case of guardian trustees and agents.

Section 41. :—Court of Wards cases.

Section 42. :—Cases on *non-residents'* liability

Section 43. :—Agents to be are.

Section 44. :—Liability in case of discontinued firm or association.

Section 44-A to 44 C. :—Stopping cases.

Section 45 to Section 48. :—Recovery of tax. Section 45 tax when payable. Section 46 mode and time of recovery of tax. Section 47 Recovery of penalty. Section 48 refunds.

Section 49-E. :—Power to set off amount of refund against tax remaining payable.

Section 49-F. :—Power of representations of deceased or disabled persons to receive refund.

Section 50. :—Limitation for claim for refund.

Section 54. :—Disclosure of information by a public servant.

Section 61: Appearance of assessee by authorized representation

Section 62:—Receipt to be given for money paid or recovered.

Section 63:—Service of notices.

Section 65:—Relates to indemnity.

Section 66:—Reference to High Court.

Section 66-A:—Hearing of references of appeal to Privy Council in certain cases.

Section-67:—Bar of Civil suit.

Section 67-A:—Computation of limitation period—date of pronouncing judgment to be extended.

A glance at the above list will show that even in certain matters of minor details the provisions of the Income-tax Act have been made applicable. These provisions are to be deemed, as incorporated in and forming part of the Excess Profits Tax Act, 1940 by virtue of this Section.

Modifications as may be prescribed:—The term prescribed has been defined by Section 2 (19) as prescribed by the Rules made under this Act. So any modifications that may be intended to be made as to the provisions of Income-tax Act, as contained in the various Sections of the 1922 Income-tax Act, enumerated in Section 20, are to form the subject matter of the Rules under the Act.

Proviso. Assessee:—An assessee under the Act is a person to whose business the Excess Profits Tax Act applies.

Section 22. (1) *Notwithstanding anything contained in the Indian Income-tax Act, 1922, all information contained in any statement or return made or furnished under the provisions of that Act or obtained or collected for the purposes of that Act may be used for the purposes of this Act.*

Income-tax papers to be available for the purposes of this Act.

(2) *All information contained in any statement or return made or furnished under the provisions of this Act or obtained or collected for the purposes of this Act may be used for the purposes of the Indian Income-tax Act, 1922.*

1. **Previous Law** :—Section 16 Excess Profits Duty Act 10 of 1919.

2. **Analogous Law** :—Regulation No. 7, of the Regulations dated 30th November, 1939, made by Commissioners Inland Revenue under Section 21, Finance Act (2) of 1939 cited under Section *ante* contains similar provisions.

3. **Scope of Section 22** :—Section 22 may well be said to be exception to the certain provisions of the Income-tax Act, 1922, whereby certain papers, documents and other records connected with Income-tax matters is treated as confidential and not generally available. Against these provisions of the Income-tax Act, Section 22 provides, that these provisions notwithstanding, all such information as is contained in these documents or has been furnished under the Income-tax Act or has been obtained or collected thereunder shall be available for use for the purposes of assessment to Excess Profits Tax.

Sub-section (2) of Section 22 contains provisions by way of reciprocal arrangement. While under sub-section (1) all information in any statement or return furnished, obtained or collected under the Income-tax Act may be used for the purpose of Excess Profits Tax assessment, sub-section (2) lays down that, by way of reciprocity, all information contained in any statement or return and furnished, obtained and collected under Excess Profits Tax Act may also be used for income-tax assessment purposes.

The two taxes are allied, and although Excess Profits Tax is levied under special circumstances it is after all a tax and the principles and rules of taxation applying to both are naturally akin and almost similar.

The scheme of the two taxes naturally differs but the principle does not and in fact, cannot.

Hence, the utility of the provision contained in Section 22. Such a provision must facilitate the work of the assessing department, in particular when the functionaries in both the

lines are the same when the same assessing Officer is to enquire into and assess income, profits and gains for Income-tax purposes, any information before him as such may well and with advantage be used when he assesses in a different capacity as Excess Profits Tax Officer.

So, the utility of the provisions contained in Section 22 is apparent and its applicability also is, after all, no difficult matter.

4. Sub-section (1).—Notwithstanding anything contained in the Indian Income-tax Act, 1922:—Section 54 Income-tax Act contains provisions according to which all particulars contained in any statement made, return furnished or accounts or documents produced under the provision of the Income-tax Act shall be treated as confidential sub-section (2) of Section 54 makes any disclosure of the above-mentioned information by a public servant punishable. Sub-section (3) of Section 54 enumerates certain disclosure which have not been penalized by the Income-tax Act.

Section 21 may thus be taken to be a string in the long test contained in sub-section (3) to Section 54 Income-tax Act.

May be used :—The expression 'may be used' both in this and in sub-section (2) of this Section, must mean may be used by the department or the assessing officer or officers. It is not a privilege accorded to the assessee or the person whose business is in question for Excess Profits Tax purposes.

Section 23. *If any person fails, without reasonable cause or excuse, to furnish in due time any return or statement, or to produce, or cause to be produced, any accounts or documents required to be produced under Section 13, he shall on conviction by a Magistrate be punishable with fine which may extend to five hundred rupees, and with a further fine which may extend to fifty rupees for every day during which the default continues.*

Previous Law :—Section 12, Excess Profits Duty Act, 10 of 1919.

Analogous Law :— (1) *Finance Act, 1937* fifth schedule Para 4 Part III.

(1) Supplementary provisions contain similar provisions.

Section 107 (1) and (3) *English Income-tax Act* also contains similar provisions.

(2) Section 51 (c) and (d) contains *Indian Income-tax Act*, the same provisions as are contained in Section 23 of the Act.

Scope of Section 23 :— Section 23, makes it a penal offence, in certain circumstances, not to furnish in time any return or statement called for by the authorities or any account or documents so called for under Section 13 *ante* :— The provision is entirely similar to the one contained in Section 51 of the *Income-tax Act 1922* amended 1939).

"Reasonable cause" :— It is a question of fact for the Magistrate to decide whether reasonable cause or excuse exists or not in a particular case.

See also notes under Section 13 *ante*.

To furnish in due time :— Section 34 (b) of 1886 Act corresponded to this provision. In a case under Section 34 (b), 1886 Act, conviction was held as bad where notice calling for return was sent by ordinary and not by registered post. ¹ In this case, accused had denied having received the notice. It was held that delivery by un-registered post did not amount to valid service of notice. While Section 23 (2) empowers the Income-tax Officer to require a person making a return to attend at his office, under the provisions of Section 61, any person required or entitled to attend before any Income-tax Authority may either attend in person or may be represented by a person duly authorised by him in writing.

The above are provisions under the *Income-tax Act* and must apply to cases under the *Excess Profits Tax Act* also.

To produce or cause to be produced :— In a case under Sections 39 (d) and 40 Act 7 of 1918 (corresponding to Sections 51 and 52 of the present Act) it was held that a penal assessment (now under Section 28) under Section 24 (of Act 7 of 1918),

(1) *Emperor v. Ramcharan* 17 A.L.J. 146: 1 I. T. C. 21: 29C 1 J. 22..

for false statement was no bar to a prosecution for failing to produce accounts and documents.¹ This is no longer good law in view of Section 28 (4). Clause 4 of Section 28, provides that where a penal assessment under that Section is imposed by the Revenue authorities, no criminal prosecution for an offence shall be instituted on the same facts. It is obviously not desirable that there should be room for a possible conflict between the Revenue and Judicial Authorities, and it is also unreasonable that a double punishment should be provided for.²

Fine...and with a further fine :— Though the words in this and in Section 51 Income Tax Act differ, a recovering fine may be imposed for default under both the Acts. In the case of 'fine' to be imposed for a continuing offence, as contemplated by this Section, fine cannot be levied prospectively. An order for payment of so much fine per day till the default continues is illegal; there must be proof of continuing offence to give Magistrate jurisdiction to make such an order.³ Whether imprisonment in default of payment of fine can be imposed under this Section, is a point that does not appear to have been decided. In one or two cases under the Municipal Acts imprisonment in lieu of default in payment of fine was held legal while in cases under the Railway Act it was held not to be so.⁴

Section 24. *If a person makes in any return required under false statement and declaration Section 13 any statement which is false, and which he either knows or believes to be false, or does not not believe to be true, he shall be punishable on conviction by a Magistrate with simple imprisonment which may extend to six months, or with fine which may extend to one thousands rupees, or with both.*

(1) K. E. V. S. M. Hussain Ali & Co. 1 I. T. C. 48, 43 M. 496 : 31 Cr. L. J. 295.

(2) Para 87 (v) I. T. M.

(3) R. v. Wazir Ahmad 24 A. 309: Ramkishan Biswas v. Mazumdar 27 C. 565.

(4) In re. Lakhima 18 B. 400: (penalty under Municipal Act was held to be fine and imprisonment in default of its payment was held legal) R. V. Rappel 18 M. 490 (Imprisonment in default of payment of fine held legal).

(5) R. V. Kutrappe 18 B. 440: R. V. Subramanya Iyer 20 M. 85 (both being cases under the Ely. Act).

1. **Previous Law:**—Section 12 Excess Profits Duty Act 10 of 1919.

2. **Analogous Law:**—

1. Finance Act 1937 fifth schedule Part III, (Supplementary proviso Para 4).

2. Section 52 Income-tax Act 1922 (amended 1939) contains similar provisions though these are more wide and comprehensive than the provision of Section 24.

3. **Scope of Section 24:**—While offences under Section 22 arise out of the non-performance of certain acts and duties imposed by the Act Section 23 deals with an offence which is *so perse*, bringing a particular statements in a return falsely made within the pale of criminal law and rendering it punishable. It is particularly noteworthy that while the range of Section 52 Income-tax Act is much wider, embracing false verifications etc., also Section 23 is limited in its scope to a case of a false statement made deliberately in the return required to be made under Section 13 *ante* :—

The conditions precedent to the applicability of Section 52 Income-tax Act, 1922 must apply to Section 23 of this Act also. These are :—(1) the statement should be false (2) knowledge or belief of the person making it that it is false or that it is not true. As such, cases of offence of wilful false statements are covered by the Section and not those of "inadvertence", 'mistake or 'misunderstanding' for which there are provisions in the Act itself (Sections 22 (3) & 34. ¹ Section 52 applies exclusively to the statements specifically enumerated therein, all others being covered by Section 476 Criminal P. Code which is not affected by this Section and proceedings under which may be taken by the I. T. Officers, Assistant Commissioners and Commissioners of Income-tax who are all 'Courts' for the purpose. ² Section 52 does not warrant threat to extort money from the assessee on pain of prosecution in case of false return.^{3-a}

(1) Patel (P.D.) v. Emperor. 1933 I. T. R. 563.

(2) Nataraja Iyer. In re. 86 M. 72, Punamchand Manek Lal 88 B. 612; para 128 I. T. M.

(3-a) Ganga Sagar (Seth) v. Emperor 1929 All. 919 : 4 I. T. C. 97.

4. Which he either knows, etc.—These words are meant to indicate a deliberately made false statement which alone is punishable. As already noted under *Scope* above, cases of inadvertence are not covered.

The case law under the Income-tax Act as to false returns must apply hereunder also.

A revised return filed under Section 22 (3) cannot condone an offence under Section 52 though it might mitigate it.¹ The offence is committed on the day the return made under Section 22 (2) is verified.² Offence under Section 52 can be tried by a Court of the place where the return is verified and not where the return is filed,³ sanction granted for an offence under Section 82 would not warrant a conviction under Section 81.⁴

No reference lies at High Court on the point whether after filing a revised return an assessee can be proceeded against under Section 52 or on any point arising out of Section 52, because Chapter VIII wherein Section 52 lies, is expressly placed beyond the pale of Section 66. (*See Section 66*) (1).⁵

5. Simple imprisonment or with fine or with both :—While an offence under Section 22 *ante* is punishable only with fine, which may be recurring, an offence under Section 23, being more serious, may be dealt with imprisonment also. It is to be noted that imprisonment is not necessary to be implicated as part of sentence under this Section, the conjunction 'or' used, indicating that both the fine and imprisonment may be either alternative or may be joined.

Section 23. (1) *A person shall not be proceeded against for an offence under Section 23 or Section 24 except at the instance of the Inspecting Assistant Commissioner.*

(2) *No prosecution for an offence punishable under Section 23 or Section 24 or under the Indian Penal Code shall be instituted in respect of the same facts as those in respect of which a penalty has been imposed under this Act.*

(1) *Ganga Sagar v. Emperor* 4 I. T. C. 97 : 1929 All. 819.

(2) *Ibid.*

(3) *Mohd. Deen Pakiri* 45 M. 889 : 1928 Mad. 50 : 28 Cr. L. J. 619. 1 I. T. C. 198.

(4) *Champa Lal Girdhari Lal* 1933 Nag. 866.

(5) *Narain Dass Mohanlal v. Commissioner* 1 T., U. P. 1933 All. 331 : 6 I. T. C. 248.

(3) *The Inspecting Assistant Commissioner may, either before or after the institution of proceedings, compound any offence punishable under Section 23 or Section 24.*

1. Previous Law:—No such provisions existed in the 1919 Excess Profits Duty Act.

2. Analogous Law :—(1) Income tax, Section 53 contains similar provisions.

3. Scope of Section 25:—An Inspecting Assistant Commissioner's sanction is necessary for prosecutions to be launched under Sections 23 and 24 of the Act just as under Sections 51 and 52 Income-tax Act, so under Sections 23 and 24 of this Act, the two offences are distinct and separate. Consequently sanction to prosecute under one would not permit of a trial and conviction under another. This was the finding in *Champalal Girdhari Lal v. Emperor** and must hold good under this Act also.

4. At the instance of the Inspecting Assistant Commissioner:—A criminal prosecution cannot, under Section 53 (1) of the Act, be instituted except at the instance of Assistant Commissioner. In most cases action under Section 23 will be effective, although in more serious cases a prosecution might be launched. Under the recent amendment the Inspecting Assistant Commissioner can act. Prosecution of assessee for offences under Section 51 and 52 cannot be commenced except at the instance of an Assistant Commissioner and the Assistant Commissioner, is, under Section 53, empowered to stay any such proceedings or compound any such offence. The power of compounding an offence is one that can be exercised not only after proceeding have been commenced, but before proceedings are instituted at all.¹ An Income-tax Officer can also lodge a complaint, but with the sanction of the Assistant Commissioner and that, even in respect of offence committed before his predecessor.² An Assistant Commissioner alone can act under this Section, his

* 1933 I. T. R. 364 (Nag.).

(1) Para 126 I. T. M.

(2) P. D. Pytel v. Emperor 1938 I. T. R. 363 (Rangoon).

powers being exclusive in the matter, not even the Commissioner or Central Board of Revenue can exercise these powers. Prosecutions in England are instituted at the instance of Assessing Commissioner.

5. Sub-section 2 :—The provisions of the sub-section are the same as those of Section 28 (4) Income-tax Act 1922 (corresponding to Section 16 of this Act). For this very reason, these provisions were added at first to Section 16 of this Act by the Select Committee. They were later transferred to this Section. They serve the same purposes here, i.e. of avoiding dealing double punishment on the same facts.

6. Sub section (3) :—Sub-section (3) of Section 25 of this Act is the same as the newly added sub-section (2) of Section 53 Income-tax (amended 1939).

The word 'may' distinctly points out to the fact that it is entirely within the discretion of the Assistant Commissioner to stay proceedings or to compound. The provision in the sub-section, however, does not permit or entitle an Assistant Commissioner, under guise thereof, to exact as large a sum as possible from an assessee under threat of prosecution. ¹

The Assistant Commissioner took proceedings for the prosecution of an assessee for offences under Sections 177 and 193 I. P. C., whereupon the assessee applied to withdraw their appeal and also prayed, by a separate application, for withdrawal of prosecution, though an offence under Section 193 I. P. C. is not compoundable, except with the consent of Public Prosecutor acting under direction of the local Government. The Assistant Commissioner dismissed the appeal but passed no order on the application for withdrawal of the prosecution. Thereupon, the assessee sought a hearing of their appeal on merits, alleging that they had withdrawn the appeal only on the understanding that criminal proceedings against them would be withdrawn. The Assistant Commissioner ordered that he had no jurisdiction to re-open the matter, the appeal having been dismissed already. Held, on reference, that there was no question of law for the Court to answer and that the

(1) *Ganga Sagar v. Emperor* 4 I. T. C. 97.

remedy of the assesses lay in applying to the Commissioner Income-tax in revision. ¹

Section 26. (1) *If the Central Board of revenue is satisfied in the case of any business that special circumstances exist which render it inequitable that the standard profits of the business in relation to any chargeable accounting period should be computed in accordance with the provisions of sub-section (1) of Section 6, and that no relief or insufficient relief has been granted under the provisions of sub-section (3) of that Section, the Central Board of Revenue may direct that the standard profits of the business shall be computed to be such greater amount as the Central Board of Revenue thinks just :*

Provided that such amount shall not exceed the statutory percentage of the average amount of the capital employed in the business unless the Central Board of Revenue is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed and that the relief, if any, afforded by the Board of Referees under sub-Section (3) of Section 6 is inadequate.

(2) *Without prejudice to the generality of the provisions of sub-section (1) the Central Board of Revenue shall, in considering the making of a direction under that sub-section, have regard to the following circumstances, namely :—*

(a) *that the capital employed in a business commenced on or after the 1st day of July, 1938, is so small in relation to the volume of the activities of the business that to compute the standard profits in accordance with the provisions of Section 6 would be inequitable, taking into account the normal profits made in similar businesses ;*

(b) *that owing to the nature of the business heavy expenditure by way of preliminary expenses or expenses in connection with experimental or development work has been incurred in accounting periods closely preceding the chargeable accounting period and that*

(1) *Shyam Sunder Bihari Lall v. Commissioner I. T., U. P. 6 I. T. C. 290.*

during the chargeable accounting period such expenditure would normally fall to be written off wholly or partly in the books of the person chargeable to excess profits tax ;

- (c) that the business is of a pioneer nature, that is to say, is concerned with an industrial process or a form of manufacture or production not undertaken in British India before the 1st day of April, 1932, and has not been in existence long enough to have paid income-tax for the previous year as determined for the purpose of the Income-tax assessment for the year beginning on the 1st day of April, 1937.

(3) If the Central Board of Revenue is satisfied that the computation in accordance with the provisions of Schedule I of the profits of a business during any chargeable accounting period would be inequitable, owing to any of the following circumstances, namely :—

- (a) any postponement or suspension, as a consequence of the present hostilities, of renewals or repairs, or
- (b) the provision of buildings, plant or machinery which will not be required for the purposes of the business after the termination of the present hostilities, or
- (c) difficulties in bringing into British India income arising outside British India where the country in which the income accrued prohibits or restricts by its laws the remittance of money to British India, and loss in the remittance to British India of such income because of fluctuations in the rate of exchange between that country and British India ;

the Central Board of Revenue may direct that such allowances shall be made in computing the profits of the business during that chargeable accounting period as the Central Board of Revenue thinks just :

Provided that in making such direction the Central Board of Revenue may impose such conditions as it deems appropriate.

1. Previous Law :—Section 9, Excess Profits Duty Act 10 of 1919 contained analogous provisions though in a different form.

2. Analogous Law:—Provisions analogous to this contained in this Section are contained in Section 18 (7) Part III, United Kingdom Finance Act (2) of 1939, where action is taken on the application of the person carrying on trade or business.

3. Scope of Section 26:—This Section was considerably altered by the Select Committee. Under this Section the Central Board of Revenue is authorized in special cases, to vary the method of computation of standard profits of any business. In the Bill as presented to the Assembly this was possible only in case of a business which was in existence before 31st March, 1936.

The two conditions precedent to the taking of proceedings under this Section that existed in the Bill, *viz.*, that the business in question should have been in existence before the 31st March, 1936 and that relief may not have already been granted under Section 6 (3) by the Board of Referees, were taken off by the Select Committee.

The maximum of the greater amount of standard profits be applied was fixed under the proviso, by the Select Committee, not to exceed the statutory percentage of the capital employed in the business. Moreover, the Section has been made applicable by the proviso to sub-section (1) to those cases also where relief has been allowed under Section 6 (3) by the Board of Referees. But the Central Board of Revenue considers the same to be insufficient. In such a case the statutory percentage may be exceeded.

With reference to the above alterations, the Select Committee observed in their Report as follows:—"The alterations made in sub-clause (1) brings the provisions of the clause as drafted into accord with clause 6 as now amended, and empower the Central Board of Revenue to exceed the amount of relief if any granted by the Board of Referees under sub-clause (3) of clause 6, or to grant relief in cases to which sub-clause (3) of clause 6 does not apply. The above alterations, thus, are consequential upon the changes made by the Select Committee in Section 6 *ante* (see thereunder.)

4. Sub-section (1) "Is satisfied":—It means by evidence and with reference to the circumstances of the case and the business in question.

5. Provisions of sub-section (1) of Section 6 :—The words 'of clause (a)' have been taken off as a consequence of change in Section 6 (1).

6. Insufficient Relief has been granted :—For this see proviso to this, *post*. The provisos of this Section have been made, by the Select Committee to be applicable to cases where though relief has already been granted under Section 6 (3), yet it is deemed by the Central Board of Revenue to be *insufficient*.

7. Proviso Statutory percentage:—This change has been made in the Select Committee. See comparative table for the original provision in the Bill. Also see the observations of Select Committee under note No. 3 *ante*.

The words 'average amount of capital' were substituted, after the words 'percentage' before the word capital' in the Assembly 'as a small drafting point' inserted for classification :

8 Sub-sections (2) & (3):—Sub-sections (2) and (3) were added to Section 26 by the Select Committee. With regard to those the Select Committee observes :—"We have inserted two additional sub-clauses, the first of which specifies two sets of circumstances which the Central Board of Revenue is required to take into consideration in making a direction under sub-clause (1) with reference to the determination of standard profits, and the second of which empowers the Central Board of Revenue in certain specified circumstances to grant allowances in computing the profits of a business during a chargeable accounting period."

9. Sub-section (2) "After the first day of July, 1938":—The words 'July, 1938', for 'December, 1938' were changed in the Assembly. As to this change it was pointed out :—"Under part (a) special relief is given where a new

business is started after 1st December, 1938. It is a very recent date and very few companies or business can take advantage of this provision. I should like this date to be altered to September, 1937, so that companies which started business two years before the chargeable accounting period under this Act begins will get special relief.

This clause No. 26 has often been referred to by *Mr. Chambers* as providing a cure for all diseases and hardships in respect of this Bill. I hope and trust that hard cases will not have hard luck when they come up to the Central Board of Revenue. I wish the Honourable the Finance Member to tell me whether it will be for the assessee to go up to the heights of Simla or come up here in Delhi for each and every relief and to employ highly paid advocates and lawyers to represent their case; or whether in cases of hardship the Excess Profits Tax Officer or the Inspecting Assistant Commissioner will themselves take up the case to the Central Board of Revenue for relief under this clause and as regards these new businesses I would like the date to be changed from 1st December, 1938, to 1st September 1937. This is a modest amendment and I think the Government will see their way to accept it." *Babu Baijnath Bajoria*).

This sub-clause gives power to the Central Board of Revenue to give relief in certain special circumstances. The object of putting in a date there was to give relief to those new businesses—run more by partnership and individuals than by a company—where the business having been started quite recently the amount of capital employed owing to the nature of the business is very small, and, therefore, a percentage on capital might be a quite ridiculous standard profit. Let me take the example of a broker in a jute exchange of produce exchange or something of that kind. In this case, the amount of capital is small in relation to the total volume of the business; and having started after a date when they have any access to a standard period, they have to take a percentage on capital which would be quite unfair. In putting in the date, '1st December, 1938', what was in mind was that there was a period of at least nine months between that date

and the 1st September, 1939, and it was thought at that time that there would be in those cases an available standard period. But it has since been pointed out that the last standard period available must under clause 6, as it now stands and not later than the 31st March, 1939, and not on the 1st September, 1939. For this reason, the date 'the 1st day of December, 1938' should, therefore, go back, at least as far back as July, 1938, so that there is at least nine months of available standard period. To go back beyond that would be giving extra relief in cases where, although special circumstances were present, there are available standard periods and, therefore, the ordinary process of appeal against the profits of a standard period would be more appropriate, what I would like to suggest, therefore, is that although we are unable to accept the date suggested by my Honourable friend, if he could, with the permission of the House, substitute for his date, the date 1st day of July, 1938, we could accept that amendment. May I ask the Honourable Member whether he will be prepared to accept that suggestion? (*Mr. S. P. Chambers.*)

"I am prepared to accept that suggestion, Sir, may I substitute the words 1st July, 1938? (*Babu Baijnath Bajoria?*)"

9. Subsection (2) Clause (c):—This was added at a motion in the Assembly. "In commending this amendment to the Government for acceptance, I want the Central Board of Revenue, when considering other suggestions where the relief is not full in accordance with the other provision of the Act, may be pleased to consider the case of the nascent industries also. The importance of this has been emphasised in the various speeches, and I need not repeat the same arguments over again. I think the Honourable the Finance Member is fully aware of the anxiety of the small industries to be protected from the Excess Profits Tax, but what I want is whether the income-tax year 1937-38 is to be included with regard to this consideration and also whether the profits made in the year 1938-39 or after are entitled to claim for relief." (*Sardar Sant Singh.*)

"I am glad my Honourable friend has brought this amendment forward, and I have pleasure in accepting it. I think that

it will be a considerable improvement on the clause 26 as it already stands and will afford a channel for a very desirable form of relief." (*Sir Jeremy Raisman*).

10. S. 26 (3) a 'Any postponement'. The word 'any' was substituted in the Assembly for the word 'either'.

11 S. 26 (3) Clause (c):—Clause (c) was added at a motion in the Assembly. "Some of my friends wanted to give certain facilities to those people trading in foreign countries where restrictions exist about taking money out of the country. It was also pointed out that there were certain exchange difficulties. Suppose we charge the Excess Profits Tax in a particular year at a given rate of exchange and the money is not brought to this country but it is brought at a later date when the rate of exchange is altered and on account of this fluctuation in the rate of exchange the amount of profit will be seriously affected. Therefore, some of my friends wanted to have some kind of provision to help such traders abroad. But my difficulty is this, if you have this facility, then more Germans and Russian will come in than the Allies; the other difficulty was that the Indian States not being within British India will come under that clause. In this particular case I give power to the Central Board of Revenue to consider such cases and remove the hardships if any so that the Central Board of Revenue will be able to distinguish between genuine cases in which difficulties have arisen from those of a purely trivial nature. I think my friends Messrs. Nauman and Lalchand Navalrai, pressed their case in season and out of season more often than I pressed the case of excess profit of iron and steel, but I think the right place to give them relief is this particular amendment, though I have not found out a right place as yet for iron and steel. Perhaps, somebody may help in this particular matter. We all desire that some relief may be given in genuine cases and the Central Board of Revenue is the best authority where this relief can be given. They will examine each case and if they are satisfied that the case is genuine one they will give relief according to merits". (*Dr. Sir Ziauddin Ahmad*.)

Section 27. (1) *The Central Board of Revenue may, subject to the control of the Central Government, make rules for carrying out the purposes of this Act.*

(2) *Without prejudice to the generality of the foregoing power, such rules may—*

- (a) *prescribe the procedure to be followed on appeals, applications for rectification of mistakes, and applications for refunds ;*
- (b) *provide for the adaptation to excess profits tax of any of the provisions of the Indian Income-tax Act, 1922, which are made applicable to excess profits tax by Section 21 ; or of any rules made under any such provision ;*
- (c) *provide in regard to companies whose business consists wholly or mainly in the dealing in or holding of investments for the granting of exemption or relief from liability to excess profits tax of profits derived from investments in other companies the profits of which have been subjected to excess profits tax in British India ;*
- (d) *provide for any matter which by, or under, this Act is to be prescribed.*

(3) *The power to make rules conferred by this Section shall be exercised in like manner as the power to make rules under section 59 of the Indian Income-tax Act, 1922.*

Previous Law:—Section 18, Excess Profits Duty Act 10 of 1919.

Under this Act, the power of rule-making vested in the the Governor General in Council. Regulations relating to certain matters have been made by the Commissioner Inland Revenue under Section 21, Finance Act, (3) of 1939 and Parts I and II of fifth Schedule Finance Act, 1937.

Scope of Section 27 :—Section 27 relates to rule-making power under the Act. It now vests in the Central

Board of Revenue, subject to the control of the Central Government.

'Applications for rectification of mistakes,' under Section 20 *ante*, have been added to clause (a) of sub-section (2) of the Section by the Select Committee. This is consequential upon a change made in Section 20 *ante*. The Select Committee observed:—"In connection with the amendment which we have made in clause 20, it is necessary that there should be power to provide for the procedure to be followed in making applications for rectifications of mistakes. The amendment made in clause (a) of sub-clause (2) provides for this."

Clause (c) to sub-section (2) of this Section has been added by the Select Committee, clause (c) in the original Bill now being clause (d) with regard to the newly added clause (c) to sub-section (2) the Select Committee observed :- "We have inserted a new clause (c) to give power to provide for the grant of relief to investment companies a part of whose investments are in British India and have already been subjected to excess profits tax."

Subsection (2) (a) application for rectification of mistake. These words were added by the Select Committee. "In connection with the amendment which we have made in clause 20, it is necessary that there should be power to provide for the procedure to be followed in making applications for rectification of mistakes. The amendment made in clause (a) sub-clause (2) provides for this."

SCHEDULE I.

[SEE SECTION 2 (19).]

Rules for the computation of profits for purposes of Excess Profits Tax.

Rule 1. *The profits of a business during the standard period, or during any chargeable accounting period, shall be separately computed, and shall, subject to the provisions of this Schedule, be computed on the principles on which the profits of a business are computed for the purposes of income-tax under Section 10 of the Indian Income-tax Act, 1922 :*

Provided that where the profits during any standard period have already been determined for the purpose of an assessment under the Indian Income-tax Act, 1922, such profits as so determined shall, subject to the adjustments required by this Schedule, be taken as the profits during that period for the purpose of excess profits tax :

Provided further that where a standard period or chargeable accounting period is not an accounting period, the profits or losses of the business during any accounting periods wholly or partly included within the standard period or chargeable accounting period shall be so computed as aforesaid, and such division and apportionment to specific periods of those profits or losses and such aggregation of those profits and losses, or any apportioned part thereof shall be made as appears necessary to arrive at the profit during the standard period or chargeable accounting period : and any such apportionment shall be made in proportion to the number of months or fractions of months in the respective periods unless the Excess Profits Tax Officer, having regard to any special circumstances, otherwise directs.

1. Previous Law :—Section 5 Excess Profits Duty Act. 10 of 1919.

2. Analogous Law :—Section 14 (1) Part III, Finance Act, (2) of 1939 and Schedule VII Part I, (Paras 1 to 13). The words of Rule (1) are practically the same as those of Section 14 (1) Part III Finance Act (2) of 1939.

3. Scope of Rule 1 :—Rule 1 contains general provisions relating to the computation of profits for Excess Profits Tax purposes. Generally speaking, the profits shall be computed on 'income tax principles,' which is the expression used in the English Act (Section 14 Part III Finance Act, 1939).

The Rule in the Indian Act Schedule amplifies it by expressly stating that such profits shall be computed on the principles on which the profits of a business are computed for the purposes, of Income-tax under Section 10 Act 1922, the words, 'or would be so computed if income-tax were chargeable on those profits' which existed in the Bill at the end of Rule 1.

before Proviso 1, have been dropped. The 1st proviso also indicates the same thing, viz., that profits determined for Income-tax purpose may be used for Excess Profits Tax purposes. Be it noted, however, that the 'previous year' rule of law is not applicable for Excess Profits Tax purposes. The profits for such purposes are the actual profits arising in the accounting period, in question.

The Second proviso makes provision for a case where a standard period or a chargeable accounting period does not coincide with an accounting period. Such cases must arise where there is no accounting period co-terminous with the standard or chargeable accounting period. In such a case an apportionment of profits (or losses) shall be made after computation as above stated, on income-tax principle having regard to the number of the months of the accounting period and that of the standard or chargeable accounting period. That is to say, the profits or losses shall bear the same proportion as the period of accounting period does to the chargeable accounting or the standard period. Where a short accounting period, say of four months, happens to fall wholly within a chargeable accounting period, the entire amount of profits would be liable to Excess Profits Tax.

To take an instance, if a contract lasts beyond one accounting period, the total profits shall be distributed over the various periods of the performance of the contract and the amount of profit to be apportioned with regard to any particular accounting period would depend upon the extent to which the contract was performed during that period.

The concluding words of the proviso provide for any special cases that might call for a special treatment, in which case discretion is given to Excess Profits Tax Officer to depart from the line of apportionment as herein laid down.

4. Separately computed :—The word 'separately' though a simple word of no numeral significance, is of importance here, in connection with Excess Profits Tax assessment. It means that it shall be computed 'separately' quite apart from the

income of the person carrying on the business which he may have from other sources. This is so because, while under Income-tax Act it is the '*total income*' that has to be taken into account for assessment purposes, for Excess Profits Tax purposes, it is only the *income from business* as 'separate' from income from any other source or sources that comes. To take a concrete instance, suppose A has income from two sources, 'business' and property and his income from property in a particular year is Rs. 30,000 while his income from business is Rs. 25,000 during the same period. His total income is thus Rs. 55,000 computed under the Excess Profits Tax Act, suppose his standard profits come to Rs. 5,000 that could have a balance of Rs. 20,000 as of profits from business assessable to Excess Profits Tax. It is not assessable, the minimum being Rs. 36,000. It would thus be exempt and his income from property would not count towards his profits, from business having been counted separately as above indicated. This makes the expression 'separately computed' clear. Under the English Law Section 14 (1) Finance Act (2) of 1939 the words 'separately computed' have been construed to mean that 'the computation to be made for Excess Profits Tax is distinct from the computation to be made for any other purpose, e. g. income tax, and in computing the profits of the standard period the computation which was adopted for income-tax purposes will not be conclusive'.¹

Computed for the purpose of Income-tax under Section 10 etc.:— This means that the profits shall be computed after allowing the deduction which are allowable under Section 10 Income-tax Act, 1922. The words used in the corresponding Section 14 of the United Kingdom Finance Act (2) of 1939 are:— "shall be computed on income-tax principles as adopted in accordance with the provisions of Part I, seventh schedule to this Act." The expression 'income-tax principles' has, in Section 14 United Kingdom Finance Act (2) of 1939, in relation to a trade or business, been put down to mean the principle on which profits arising from trade or business are computed for the purposes of Income-tax under Case 1 Schedule D, or would

(1)* *Glenboig Co. Ltd. v. Commissioner Inland Revenue* 12 T. O. 497.

be so computed if income-tax were chargeable under that case in respect of the profits so arising. Schedule 7 relates to computation of profits and capital for Excess Profits Tax purposes and Part I of that schedule is headed 'Adoption of Income-tax principles as to computation of profits.' The following have, *inter alia* been held not to be allowable deductions for purposes of computing profits for Excess Profits Tax purposes, under the United Kingdom Law :—

1. Sums set apart from time to time for making good the depreciation in the value of securities, as required by the Assurance Companies Act, 1909. ¹
2. Bonus paid to directors ²
3. Lump sum paid to a retiring director, in addition to remuneration. ³
4. Advance made by a manufacturing company from securing raw material. ⁴
5. Loss incurred by company in paying penalty under Customers Act and legal expenses. ⁵
6. Penalty under customers Act and costs of proceedings ⁶
7. Compensation paid for unexpired contract ⁷
8. Managers' remuneration ⁸

Proviso 1 :—"Have already been determined for the purposes of assessment under the Income-tax Act 1922 :—As already stated above, these words point out to the fact that profits ascertained for income-tax purposes may be used for Excess Profits tax purposes also.

Proviso 2 :—Is not an accounting period :—The expression, 'is not accounting period' means that the standard period

(1) Irish Catholic Church Property Insurance Co., Ltd. v. Commissioner Inland Revenue 12 T. C. 13 (18, 20, 21).

(2) Pegg and Ellan Jones Ltd. v. Commissioner Inland Revenue 15 T. C. 82 (88, 90, 93).

(3) Pegg & Ellan Jones Ltd. v. Commissioner Inland Revenue 15 T. C. 83 (89, 90, 92).

(4) Charles Marsden and Sons Ltd. v. C. I. R. 12 T. C. 217, 220, 225

(5) C. I. R. v. E. C. Warner and Co. Ltd. 12 T. C. 221 (230, 232).

(6) C. I. R. v. Alexander Von Green Co. Ltd. 12 T. C. 282 (283, 284, 244).

(7) John Smith and Sons v. Moore 12 T. C. 266 (272, 277, 297)

(8) *Ibid.*

or chargeable accounting period is *not the same as* accounting period *i. e.* does not synchronize with in point of period or time. It will sometimes be the case that an accounting period of the business will not coincide with the chargeable accounting period or with the standard period. In such a case the method of apportionment as laid down in this proviso is to be followed. See also notes under Scope *ante*. The words of proviso 2 are the same as those of Section 14 (1) proviso United Kingdom Finance Act.

A further proviso was proposed to be added to Rule 1, as follows :—

“Provided further that in computation of profit accruing or arising without British India, the standard profits and the profits of the chargeable accounting period may at the option of the person carrying on the business be computed at the rate of exchange appropriate to the standard profits or the chargeable accounting period”. It was observed in this connection :—
“This schedule makes rules for the computation of profits for the purpose of Excess Profits Tax. This amendment which relates to trades whose profits arise without British India—the question is with respect to the exchanges. The exchange rate may be one appropriate to the standard profit, and at the time of the chargeable accounting period the exchange may be different, and, this amendment asks that an option should be given to that person to choose the exchange at which his profits should be computed. The option should be either the rate of exchange at the time of the standard profit or the rate at the time of the chargeable accounting period. As regards amendment No. 117 it was left to the discretion of the Central Board of Revenue, and I submit that in this case also a provision be made that the Central Board of Revenue or the Income-tax Officer should give the option to the person to have his profits determined according to one or the other rate of exchange. Many difficulties arise in considering the rates of exchange and people who are there will know exactly what the exchange there was at a particular time which may not be known to the Government here, and if the Government say that there is no such provision to give an option the

man suffers. Therefore, I submit that this amendment should be accepted, but if the Honourable Member is not in a mood to do so, if he can give an assurance that this will also be considered by the Central Board of Revenue if an assurance to that effect is given, then I may ask for leave to withdraw the amendment. But I want an assurance that the question of option will be considered by the Central Board of Revenue with regard to these exchanges." (*Mr. Lalchand Navarai.*)

The motion was opposed :—" I oppose this amendment. Relief has already been given by the acceptance of amendment No. 117 and the effect of the relief which will be given under that sub-clause is this, that where any exchange loss was incurred during the chargeable accounting period, or where, owing to difficulties in bringing in the profits in that period, the profits could only be brought in at a later date and were then brought in when the exchange was less favourable in all those circumstances the exchange loss will be allowed in the chargeable accounting period. Therefore, as far as I can gather, all possible cases have been provided for but this amendment goes further and suggests that the assessee should have the best of both worlds. He should be able to go back to the standard period and have his profits in the chargeable accounting period computed by reference to a rate of exchange which may have no relation whatever to the rates in force during the chargeable accounting period. The rates in 1935 and 1936 in many countries in relation to India are entirely different or may be entirely different from what there are in 1940 or will be in 1941 and to give the assessee an option to choose one or the other seems to be quite inappropriate. We have given them all the relief which can reasonably be asked for." (*Mr. S. P. Chambers.*)

The motion was therefore negatived.

Profits or losses :—Under Section 16 (2) *ante*, defining 'loss' 'losses' for Excess Profits Tax purposes, are to be computed in the same manner as 'profits'.

Accordingly, when in any case, the contingency mentioned in the 2nd proviso to R. 1, arises, losses also, like profits may be apportioned over several accounting periods.

It is notable in this connection under the United Kingdom law, that losses cannot be carried forward from one period to another for Excess Profits Tax purposes and cannot be set off against profits, as is possible under the Income-tax Law. The same is the case in India. (In the connection please also see page 120-121.)

Under Rule 3 (3) Section 24 (2) Income-tax Act 1922, relating to the carrying forward of losses is not applicable for Excess Profits Tax purposes.

Then the term 'loss' for Excess Profits Tax purposes is confined, by Rule 3 (2) to loss sustained many business to which the Excess Profits Tax Act applies and to no other.

Rule 2. The profits of a business during the standard period shall be computed on the same basis and in the same manner as the profits of that business are under the Indian Income-tax Act, 1922, as amended by the Indian Income-tax (Amendment) Act, 1939, computed for the chargeable accounting period, notwithstanding that the Indian Income-tax (Amendment) Act, 1939, may not have been in force in the standard period.

Rule 2 is new, having been added by the Select Committee with regard to this, the Select Committee observed:—"This new provision is intended to secure that the computation of profits in any standard period should be made on the same basis as the computation of profits in the chargeable accounting period, and in particular that depreciation should be, calculated on the written down value basis instead of on the cost basis and that income assessable on the arising basis in the chargeable accounting period but on the remittance basis in the standard period for income-tax purposes should be computed on the arising basis of excess profits tax purposes."

Thus, fairly enough, the Select Committee have chosen to make an express provision in the Rules for computation of profits that the basis of computation, both in the case of 'standard period' and chargeable accounting period should be the same.

Depreciation, in particular, is to be calculated on 'written down value' and not on cost basis.

Above all, income for Excess Profits Tax purposes, is to be computed on arising or accrual basis, and not on basis of remittances in the chargeable accounting period. The arising or accrual basis has been adopted though remittances basis may have been adopted in the standard period.

2. Profits of a business during the standard period :—It is a well known fact that, under the Excess Profits Tax law, the determination of profits of a particular standard period is a matter of basic importance. It is, indeed, the most relevant and material point whether the particular profits sought to be assessed to Excess Profits Tax relate to the particular standard period. There are a number of English cases on the point. In *J. P. Hall & Co. Ltd. v. Commissioner Inland Revenue* ¹ it was held that the profits out of contracts for delivery of goods should be taken to have accrued when the goods were delivered and that they should be brought into accounts as and when they were realized.

In *Short Bros. Ltd. v. Commissioner of Inland Revenue* ² it was held that profits by way of compensation received for cancellation of contract must be included in the profits for the accounting period in which the compensation became payable and was in fact paid.

In the *Sunderland Shipbuilding Co. Ltd. v. Commissioner Inland Revenue* ³ compensation for cancellation of contract was held to be a profit of the period during which the agreement for cancellation of contract was entered into. Similarly in *Commissioner Inland Revenue v. The North Fleet Coal and Ballast Co. Ltd.* ⁴ lumpsum paid in lieu of annual sums, in consideration of foregoing delivery of check for the unexpired period of the contract was held to be profits of the accounting period during which the sum was agreed to be paid.

(1) 12 T. C. 862.

(2) 12 T. C. 955.

(3) *Ibid.*

(4) 12 T. C. 1102.

In *Jessie Robinson & Sons v. Commissioner Inland Revenue* ¹ contract entered into on 30th March, 1920, was cancelled on 29th June, 1920, upon condition of payment by purchaser of a certain sum, to be received under the original and substituted contract. The sum, though received in two instalments in January and August, 1921, was treated, as trading receipt or profits of the accounting period of one year ending 30th June, 1920. In the case of another contract, in this very case, contracts were made for sale of certain quantities of yarn on 20th August, 1919 and 15th March, 1920. In July, 1920 the purchaser cancelled the contracts. In June, 1921, the purchaser agreed to pay a certain sum as damages for breach of contract.

This sum was paid in June, 1921. It was held that the sum formed part of profits for the accounting period of the year ending 30th June, 1921. Where damages suffered during the final accounting period were repaid after close of that period, the costs thereof were held as deductions allowable in respect of that period. ²

Rule 3. (1) *The principle of adding the allowance for depreciation for any one period to the allowance for depreciation for any subsequent period and deeming it to be part of the allowance for such subsequent period shall not be followed.*

(2) *No allowance shall be made for any loss other than a loss sustained in a business to which this Act applies.*

(3) *Nothing in this Act shall be construed as permitting the application, in computing profits for the purposes of the excess profits tax, of the provisions of sub-section (2) of Section 24 of the Indian Income-tax Act, 1922.*

1. Analogous Law :—Part 1 Schedule 7. Finance Act, 2 of 1939 contains similar provisions to prohibition against carrying forward of losses.

(1) 12 T. C. 1241.

(2) *Naval Colliery Co. Ltd. v. C. I. R.* 12 T. C. 1011 (1017).

2. Scope of Rule 3 :—Rule 3 relates to 'depreciation' losses. The connotation and scope of the term 'loss' has, by this rule, been restricted to such losses as are sustained in a business to which the Act applies [Rule 3 (2)]. By Rule 3 (3), the carrying forward of losses have been prohibited for Excess Profits Tax purposes. Section 24 (2) Income-tax Act, 1922 being made expressly inapplicable. This, as already indicated above under the general provision contained in Rule 1 *ante*, is in accordance with the English law.

Sub-rule (1) of Rule 3, this prohibits the carrying forward of 'depreciation allowance' for one period to a subsequent period depreciation allowance and adding to it.

The Rule, as it existed in the Original Bill presented to the Assembly was not quite so explicit as it is now. Its drafting was improved by the Select Committee, who observed with regard to it in their Report. "The intention of the rule was to make explicit provision to prevent the carrying forward of losses under Section 24 (2) of the Indian Income-tax Act, 1922, although that Section is not one of the Sections of the Income-tax Act which are applied by clause 20 (now 21) of the Bill. We have revised the drafting of the rule to exclude the possibility that by a wider interpretation of the rule than was intended expenses charged in the accounting period might be disallowed on the ground that the loss though appropriate to the accounting period was not actually made in that period. It is notable that though 'losses' are previous not to be carried forward, such losses are not ignored in Excess Profits Tax law. The said loss is reflected in the shape of 'deficiency' under Section 7 of the Act."

Rule 4. (1) *Income received from investments shall be included in the profits in the cases and to the extent provided in sub-rules (2) and (4) of this rule and not otherwise.*

(2) *In the case of the business of a building society, or of a money-lending business, banking business, insurance business or business consisting wholly or mainly in the dealing in or holding of investments, the profits shall include all income received from investments, whether or not such income is*

included in the profits charged under Section 10 of the Indian Income-tax Act, 1922, or is charged under any other Section of that Act, or has been subjected to deduction of tax at source or is free of or exempt from income-tax.

(3) Notwithstanding anything contained in sub-rule (2), where the profits of a subsidiary company are under the provisions of Section 9 to be included in the profits of the principal company for the purposes of assessment to excess profits tax, dividends from the subsidiary company out of such profits shall not also be included in the profits of the principal company.

(4) In the case of a business which consists wholly or partly in the letting out of property on hire, the income from the property shall be included in the profits of the business whether or not it has been charged to income-tax under Section 9 of the Indian Income-tax Act, 1922, or under any other Section of that Act.

(5) Where the person carrying on a business is the beneficial owner of any investments, the income from which is by virtue of the provisions of this rule not to be taken into account in computing the profits of the business, and a deduction would, apart from the provisions of this rule, fall to be made in respect of interest on borrowed money, the deduction (if any) to be made in respect of that interest shall be computed as if the principal of the borrowed money were reduced by the value of these investments :

Provided that where the person carrying on the business is not a company, no such reduction shall be deemed to be made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and interest thereon.

1. Analogous Law :—Rule 6, Part 1 Schedule 7 English Finance Act (2) of 1939 contains similar provisions.

2. Scope of Rule 4 :—Rule 4 deals with income from investments and points out how far and in what particular cases

would such income be taken into account in computing profits. Such Rules (2) and (4) indicate this and restrict the computation of profits from investments to those cases and to the extent therein mentioned only. This is the clear sense of Rule 4 (1).

3. Rule 4 (1) (a) "Income received from investment" :— There may be cases where investment income is received under deduction of tax, or where dividend is paid free of income-tax. In such a case apparently, the 'gross' and not the 'net' amount of investment income shall be taken into account in computing profits. The words, 'or has been subjected to deduction of tax at source, or is free etc.' in the succeeding sub-rule (2) clearly support the view above indicated.

Rule 4 (1). (b) "Shall be included in the profits" :— Seems clearly to mean that investments shall be treated as a receipt or a self contained item of profit'. The expression nearly means that investments shall also form part of the profits to be computed, though it may be that even after this inclusion, the net result may be a 'loss' and not 'profits.'

The rule is concerned only with 'income received from investments', with no reference to 'other property'. This is supported also by the use of the words, 'or business consisting wholly or mainly in the dealing in or holding of investments', occurring in sub-rule (2), there there is no reference to 'other property.' In the English decisions under Excess Profits Duty Act (2) of 1915 it has been held that the words 'investments' is to be taken in its ordinary sense, and it is to be taken in its ordinary sense as being an investment whether it be or be not connected with the business that is carried on by the investor ¹ In the same case, it was observed ² that "investment"..... does not include all money embarked in the business itself..... butit includes money embarked in the business and with a view to the advantage of the business invested in an outside security".

(1) Per Lord Stenrdale M.R. in *C.I.R. v. The Gas Lighting Improvement Co. Ltd.* 12 T.C. 508 (525)

(2) Per Viscount Cave L.C. at p. 535-536

In the case of shares and debentures, the motive of purchase did not prevent the same from being treated as 'investments.'¹ In another English case, *Liberty & Co. Ltd. v. Commissioner Inland Revenue*² War Loans and British Government securities were held to be investments, although those had been acquired for the purpose directly connected with the business and it was observed (*Per Pollock M.R.*) that it was impossible to place a restricted meaning on the word 'investment.' In *James Waldis & Sons Ltd. v. Commissioner Inland Revenue*³, however advances made without interest or security by a coal company and secure supplies of coal were held to be capital employed in business and not investments.

4. Sub-rule 2 :—In the cases mentioned in this rule viz., in the case of the business of

1. a building society.
2. a money-lending business.
3. Banking business
4. Insurance business.

5. Holding (wholly or mainly) of investments the entire income from above mentioned business shall be included as 'profits' assessable to Excess Profits Tax, and this would be so, irrespective of the same having been charged under Section 10 or any other Section of Income Tax Act or irrespective of the fact whether tax on such income has been recovered at source or whether such income is free as exempt from tax.

The use of the two words, 'money-lending business' and 'banking business' is significant. The latter term is wider than the former as, a 'banking business' includes, 'money lending business' and something more than that. The words after from investment '*being income to which the persons carrying on the business are beneficially entitled to*' appearing in para 6 (2) Schedule 7, United Kingdom Finance Act (2) of 1939 do not find place in this sub-rule. The words 'whether or not..... income-tax' appearing at the end of this sub-rule are more applicable here.

(1) *Ibid* per Lord Finlay at p. 569

(2) 19 I. T. C. 680.

3. 13 T.C. 113 (119, 127, 128)

5. Sub-rule 3 :—This sub rule was added by the Select Committee and relates to a case of subsidiary company, where its profits are included in the Excess Profits Tax assessment of the principal company. In such a case, the dividends given away by the subsidiary company out of its profits shall not be included in the assessable profits of the principal company. With regard to this sub-rule the Select Committee observed :—“A new sub-rule (3) has been inserted to secure that where, under clause 9 of the Bill, profits of a subsidiary company are included in the excess profits tax assessment of the principal company, dividends from the subsidiary company out of such profits should not also be included in such assessment.*

6. Sub-rule 4 (4) :—Rule 4 (4) [which was R. 3 (3) in the original Bill as referred to Select Committee], relates to business of letting out property on hire. With regard to this sub-rule, the observations in the minute of dissent by Sir Cowasji Jehangir, one of the member of Select Committee will help in the understanding of the scope of the Rule. He observed :—“It has been admitted that there should be like-to-like between the standard period and the chargeable accounting period. I would like to point out one case in which it appears to me there will not be like-to-like under Schedule 1, Rule 3 (3).

As is well known, in several large cities in India there were a large number of vacancies in buildings, due to the activity of building enterprise and a lack of demand. The result is that there was a greater supply than demand. There may be in the standard period a deficiency in revenue due to such vacancies in real property, while in the chargeable accounting period such vacancies may decrease, correspondingly increasing the revenue. This may not be due to the war. If we are to compare like with like, I think, there should be some allowance in the Bill whereby the extra revenue in the chargeable accounting period is comparable with the revenues in the standard period”.

Under sub-rule (4), income from letting out property on hire shall count towards profits assessable for Excess Profits Tax purposes, irrespective of any assessment of that income under Section 9 or any other provision of the Income-tax Act.

* This sub-rule may well be said to be an addition consequential on the provisions of Section 9 of the Act.

7. Sub-rule S. (5):—This sub-rule (5) of Rule 4 is the same as the English para. 6 (3) Schedule VII, Finance Act (2) of 1939.

This sub-rule relates to cases of beneficial owner of investments, whose income is not to be computed as 'profits', assessable to Excess Profits Tax. If investment has been made out of borrowed capital, interest on such borrowed money has to be deducted.

The sub-rule provides that borrowed capital would count after deducting the value of investments from it deductible would be computed on the balance left after the deduction of the above value.

The sub-rule, in effect, deals with cases in which the person, carrying on the business, not being of the group mentioned in Rule 4(2) *ante*, employs borrowed money and is the beneficial owner of investments, is the subject of Rule 4. The effect of the provisions of the sub-rule is that in the case therein mentioned the person carrying on the business cannot have the double advantage of being allowed to have his investment income out of account and at the same time, to treat the entire amount of the interest on borrowed capital as a deductible expense. The amount of deductible interest is restricted.

The proviso restricts the deduction to be made as above, in cases where the person carrying on the business is not a company, only in cases where the investments are mortgaged, charged or hypothecated from repayment of the principal borrowed for investment purposes, and interest therein. The provision thus, specifies the restriction placed on the deduction of interest as borrowed money in cases of business carried on by a company.

Rule 5. *If at any time after the close of the standard period, any increase in the capital employed in a business has been effected by means of a loan from a bank carrying on a 'bona fide' banking business, or by means of a public issue of debentures secured on the property of the company, the interest on so much of the loan or debentures as has been utilised in effecting the increase in the capital shall not be deducted in computing*

the profits for the purposes of excess profits tax, and, notwithstanding the provisions of rule 2 of Schedule II, that amount of such loan or debentures shall not be deducted in arriving at the amount of the capital employed in the business.

This rule is new, having been added by the Select Committee to the Rules in this Schedule 'to provide relief in cases where a business has been expanded with capital borrowed from a bank or on debentures by securing that the interest paid on the loan should be disallowed and the loan itself should not be deducted from the total capital. The effect will be to substitute as a charge, in computing the profits liable to Excess Profits Tax, the statutory percentage for the interest actually paid on the loan.'

In an English case, *A. W. Walker & Co. v The Commissioner Inland Revenue*¹ it was held that a certain fixed share, 3/20th of the profits of a firm, to be paid, along with a fixed annual amount, payable towards money borrowed for business was not 'interest' on money borrowed, and was therefore not, deductible in computing profits assessable to Excess Profits Duty.

As the words, 'by means of a public issue of debentures secured on the property of the company', indicate the Rule will apply to business carried by a company only and not by individuals. The expression, 'Bank carrying on *bona fide* banking business', would evidently exclude from the point of the rule cases where money has been borrowed from private bankers. This has been objected to (see dissenting notes cited below).

'Notwithstanding the provisions of Rule 2 Schedule 11' Schedule 11, Rule 2 *post* enjoins deduction of any borrowed money for purposes of computation of capital. So, the rule is an exemption to Rule 2, Schedule 11.

The dissenting note on this Rule by Sir Cowasji Jahangir, member of Select Committee, throws a flood of light as to the Rules and the question of recognizing loans from Banks carrying on *bona fide* banking business (and not from private banker).

The said dissenting note says:—"Until the Select Committee had decided to include this Rule in the Bill, the Bill had

provided that borrowed moneys, and debts shall be deducted from the capital employed in the business.

It is a matter of common practice that apart from the paid-up share capital and the various reserve funds which have been accumulated out of past profits, moneys have to be borrowed and debts have necessarily to be incurred for the expansion and the carrying on of the day to day business ; the computation of the capital employed in the business, as was provided in the Bill, did not represent the actual capital employed in the business, which alone makes it possible for the business to earn its profits. If profits are made subject to the excess profits tax and the basis on which these profits are earned is determined on a footing which excludes a large part of the moneys constituting such capital employed, businesses would be placed at a serious and unfair disadvantage. Moneys borrowed by businesses are not only from Banks carrying on *bona fide* banking business, or by means of public issue of debentures. Businesses also have deposits—public and others—like deposits against contracts ; they also have funds, like provident funds, which are used as a part of the working capital of the business ; they also have liabilities like purchases of goods not paid for, wages due and claims under dispute. The New Rule 3 (a) only gives relief when the loans are from *bona fide* Banks, or if the money is raised by the issue of debentures. It takes no account of moneys borrowed in any other way. Considering the conditions that prevail in India, this constitutes a real hardship."

On the same rule, another member of the Select Committee (*H.P. Mody*) observed :—" The distinction sought to be drawn between capital borrowed from a Bank and capital raised by means of deposits and loans from firms and private individuals is unsound, and goes counter to a very widely adopted practice of raising finance in this country. It is only fair that this type of borrowed capital should be recognized."

A similar dissenting note (by *Ziauddin Ahmad*) is :—" Suggestion was also made (but not accepted by the Committee) to treat loans raised from individuals who practically act as a Bank on the same level as a registered Bank. The loss due

to this concession would be nominal and it would only be 6 lakhs in the whole year and about 2 lakhs in the current year, which we can easily afford in view of the other big concessions given." Another dissenting note (by *Messrs. Raza Ali & H.A. Haroon*) is :—"We cannot say that the principle of uniformity has always been adhered to. For instance the Bill as amended allows the money borrowed from a Bank being treated as part of a company's capital but refuses to put loans from the public or deposits on the same footing."

Rule 6. *No deduction shall be made on account of liability to pay, or payment of, income-tax, super-tax, or excess profits tax.*

Analogous Law :—The United Kingdom Finance Act 2 of 1939. Schedule 7, part 1 para 8 contains the same rule. Income-tax and Excess Profits Tax are both non-deductible under that Rule. So is National Defence contribution. Super-tax finds no place in the English Rule as it does under Rule 5.

2. Scope of Rule 6 :—The Rule excludes from deduction not only any amount payable but even that paid in respect of income-tax, super-tax, or Excess Profits Tax.

In connection with this see the provisions of Section 12 *ante* also. The following example would illustrate and explain the above Rule.

Assessment year 1940-41			Rs.
Suppose total Income	...	...	2,00,000
Less standard profits	.	..	1,00,000
Net Profit	...	...	1,00,000
Excess Profits Tax	...	...	50,000

The sum of Rs. 50,000 shall be deductible for Income-tax assessment purposes under Section 12 of Excess Profits Tax Act.

Income-tax being payable on the total income of Rs. 150,000 only and not on Rs. 200,000.

Coming to the assessment for 1941-42.			Ra.
Suppose the income is again	...	...	200,000
Standard profits	...	...	100,000
Sum for Excess Profits purposes is	...	...	100,000

Then, for computation of profits for assessment to Excess Profits Tax for 1941-42, the amount of Rs. 50,000/- paid as

Excess Profits Tax or any amount paid as income-tax or super-tax in past year 1940-41 shall not be deductible. Thus the Excess Profits Tax payable would again be the same sum of Rs. 50,000.

Rule 7. (1) *In the case of a business carried on, in any accounting period which constitutes or includes a chargeable accounting period, by a company the directors whereof have a controlling interest therein,—*

- (a) *if the standard profits of the company are computed by reference to the profits during a standard period, no deduction shall be allowed in respect of directors' remuneration in excess of the amount paid for directors' remuneration in respect of the standard period or, if the standard period is longer or shorter than the accounting period, in excess of a sum which bears to the sum paid for directors' remuneration in respect of the standard period the same proportion as the length of the standard period ;*
- (b) *if the standard profits are not computed by reference to the profits during a standard period, no deduction shall be allowed in respect of directors' remuneration.*

(2) *In this rule the expression "directors remuneration" does not include—*

- (a) *the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through the medium of other companies or by any other indirect means, to control, more than five per cent. of the ordinary share capital of the company, or*
- (b) *the remuneration of any managing agent where such remuneration is included in the profits of the managing agent's business for [the] purposes of excess profits tax.*

1. Analogous Law :—Schedule 7, part 1, para 10, English Finance Act (2), of 1939 contains similar provisions.

2. Scope of Rule 7 :—Rule 7, relates to the point of deduction of remuneration paid to directors of a company, where the

directors have a controlling interest. Clause (a) of 10 (1) relates to cases where standard profits are computed by reference to the profits of a standard period while clause (b) relates to a case where standard profits are not so computed. In an English case, *Moore v. Stewards*¹ a case under the Income-tax Act, sum paid for obtaining a commanding interest by one company in the management of another, was allowed as deduction. Obtaining a majority of issued shares in a company has been held to be a controlling interest.² In a case under the corporation Profits Tax a director holding one half of shares in the company and having a casting vote was held to have a 'controlling interest' in the company.³ The power that the number of shares held gives to the holder to control the disposal of company's assets and the administration of company's affairs at a general meeting has been held to be 'controlling interest'.⁴ In the same case it was held that to cast a preponderating vote at a general meeting of a company implies *prima facie* a controlling interest. A share-holder has a controlling interest whose holding in the company is such that in general meeting he is more powerful than all other shareholders put together.⁵ Clause (a) of sub-section (1) has reference to cases where standard profits are computed by reference to profits of a standard period. In such a case only the amount paid during the standard period as directors remuneration shall be allowed as deduction. If the accounting period and the standard period do not synchronize, a proportionable amount will be deductible, with reference to the proportion that the length of the accounting period bears to the length of the standard period. Supposing, the accounting period is four months, the standard period being a year, then only one-third of the sum paid shall be allowed as deduction. Where standard profits are not computed by reference to standard period, no deduction on this account (i.e. directors' remuneration) shall be allowed.

Sub-section (2) excludes from the definition of 'directors' remuneration' two cases (a) and (b) Case (b) has been added

(1) 6 T. C. 501.

(2) *Glasgow Expanded Metal Co. Ltd. v. C. I. R.* 12 T. C. 578.

(3) *C. I. R. v. B. W. Noble Ltd. v. B. W. Noble Ltd. v. C. I. R.* 12 T. C. 911.

(4) 12 T. C. 578 (above cited).

(5) 12 T. C. 911 (326) (above cited).

by Select Committee with reference to which they observed :—
“The addition made in sub-rule (2) secures that a company shall be able to have the remuneration paid to a managing agent allowed as an expense where that remuneration is itself subject to excess profits tax in the hands of the managing agent.”

Rule 8. In the case of a business carried on by a company, if the standard profits of the company are computed by reference to the profits during a standard period, no deduction shall be allowed in respect of remuneration paid to a managing agent in excess of the amount which would have been payable to that managing agent if the agreement in force in the standard period had been in force in the chargeable accounting period, except where such remuneration is subjected to excess profits tax in the hands of the managing agent.

Rule 8 :—The Rule has been added by the Select Committee and is, as they observe, a consequential addition. “In consequence of the change made in rule 7 (2), by which remuneration paid to managing agents has been excluded from directors’ remuneration in certain cases we have inserted this provision to disallow for the purposes of the excess profits tax computation the payment to managing agents of remuneration at a higher rate than the rate in force in the standard period.”

“Except where such remuneration.....agents.” These words were added at a motion in the Assembly. “We have understood this particular rule and we suggest that it does, as it stands, inflict a hardship. Under the rule, an increase in the remuneration of the managing agent is not taken into consideration in arriving at the profits of the assessee, in this case the company: but it is taken into consideration in arriving at the profits of the managing agent. Hence the Excess Profits Tax is really charged twice on the amount of the increase. This, we suggest, is really inequitable and there would be a number of cases affected. The House will recollect that the Companies Act was passed in 1936 and, as a result of the passing of that Act, a large number of new agreements were entered into or a number of the agreements of managing agents were revised. I am thinking of the particular case of a company in connection with remuneration. Before

the Act came into force, it was charged on the basis of a percentage of the dividends. When the Act was passed, the agreement was amended and the remuneration is now based upon the net profits. Similarly there have been many other agreements altered in order to bring them into line with the provisions of Section 87-C of the Companies Act. Then, again, a company, quite apart from the Companies Act, may take one of the earlier options provided in the Bill for the standard period. The agreement of the managing agents may have been terminated and may have been replaced by a new agreement on a different basis of remuneration. We suggest, therefore that it is not equitable that the excess profits tax should be charged doubly on the actual amount of the increase which, we fear, will be the case if the rule stands as it is. It may be argued that if the amendment we have proposed is accepted, there will be a time when trade is bad and when the remuneration from other companies is reduced and thus the total assessable profits of the managing agents will be lessened. That in our view, does not really justify a provision which involves taxing increased remuneration twice. I do, therefore, hope that my Honourable friends will be ready to accept this modification of the rule," (*Mr. F. E. James*).

"Sir I admit at once that the rule as provided would, in some cases, involve double excess profits tax, that is to say there would be a disallowance in the company's assessment and the same remuneration would appear in the managing agent's assessment and I admit that that is a hardship which should be remedied. On the other hand as the Honourable the Mover has himself pointed out this amendment has its dangers in that as worded if the profits are included in the managing agents' profits for the purposes of excess profits tax, that does not mean that the excess profits tax will in fact be payable on that remuneration. What I would like to suggest is that if the Honourable Member can, with the permission of the House, withdraw his amendment and substitute one which differs from it very slightly and which deals with the principle of his amendment, then it would be acceptable. The amended words would read like this "except where such remuneration is subjected to

excess profits tax in the hands of the managing agents". The original wording is: "except where such remuneration is included in the profits of the managing agents' business for the purpose of excess profits tax". The substituted wording is more precise and does exclude the possibility of abuse." (Mr. S. P. Chambers.)

The above amended words were then added.

Rule 9. *Where the performance of a contract extends beyond the accounting period, there shall (unless the Excess Profits Tax Officer, owing to any special circumstances, otherwise directs) be attributed to the accounting period such proportion of the entire profits or loss which has resulted, or which it is estimated will result, from the complete performance of the contract as is properly attributable to the accounting period, having regard to the extent to which the contract was performed therein:*

Provided that when any such contract has been completed and the profits have been finally ascertained, if the aggregate of the amounts attributed to previous accounting periods exceeds the profit, as finally ascertained, from the complete performance of the contract, an adjustment shall be made to reduce the amounts so attributed to the various chargeable accounting periods to the amount of the profits as finally ascertained.

Analogous Law:—Rule 11, Schedule 7, Part, 1, English Finance Act, (2) of 1939 is similar to this Rule.

1. Scope of Rule 9:—The Rule is applicable to and covers cases where a contract cannot be or is not complied within the accounting period.

2. In such a case, profits or loss resulting from the performance of the contract shall be adjusted in proportion to the period taken in the performance of the contract. It is a case of adjustment or apportionment of profits or loss, as the case may be, resulting from the performance of the entire contract, with reference to the entire period taken in the performance, by presuming that the performance has taken place during the accounting period and having reference to the event to which performance was made during that period.

The rule, though providing, that an apportionment has to be made with reference to the extent to which the contract was performed in the accounting period, does not, in effect lay down this to be the decisive determining factor as to the proportion 'property attributable to the accounting period'.

3. 'Unless the Excess Profits Tax.....otherwise directs':—

The words 'otherwise directs' seem to govern the application of the entire proviso of the Rule as a whole. The Excess Profits Tax Officer might direct that there will be no apportionment at all. The matter is entirely within the Excess Profits Tax Officer's discretion. In England, the Commissioner's discretion takes the place of the Excess Profits Tax Officer and according to the case law there the exercise of discretion by the Commissioner was not open to appeal.*

4. Proviso :—The proviso to the Rule has been added by the Select Committee, who observe as to it:—"we have added a proviso providing for the adjustment of the profits of a completed contract when finally ascertained

So, the proviso makes proviso for final adjustment of a profits, when a contract, the performance of which extends beyond the accounting period, has been fully performed.

Rule 10. *In respect of any building erected on or after the 1st day of September, 1939, which during any chargeable accounting period has ceased to be required for the purposes of the business or has been sold, any amount by which the value of the building at the date when it ceased to be required for the purposes of the business or the price obtained for the building, as the case may be, falls short of the written down value of the building shall be allowed as a deduction in arriving at the profits of that chargeable accounting period.*

This Rule has also been added by the Select Committee with a view to accord special treatment to building erected during the war.

Any loss incurred on the construction of such building: computed with reference to its, 'written down value' and the

* (Smith & Sons v. Moore 12 T. C. 208.

Thom. Hinshelwood & Co., Ltd. v. C. I. R. 12 T. C. 417).

sale price or market value at the date it ceases to be of use for the business for which it was built, will be an allowable deduction.

The Select Committee observed:—"We have provided for special treatment of buildings erected during the period of war which might on the cessation of war conditions become almost valueless. The case of new machinery and plant which may have to be scrapped at the end of the war is provided for by the obsolescence provisions of Section 10 of the Indian Income Tax Act, 1922."

SCHEDULE II

[SEE SECTION 2 (3).]

Rules for computing the average amount of capital.

Rule 1. *(1) Subject to the provisions of this Schedule, the average amount of the capital employed in a business (so far as it does not consist of money) shall be taken to be—*

(a) so far as it consists of assets acquired by purchase on or after the commencement of the business, the price at which those assets were acquired, subject to the deductions hereafter specified ;

(b) so far as it consists of assets being debts due to the person carrying on the business, the nominal amount of those debts, subject to the said deductions ;

(c) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the business, subject to the said deductions.

(2) The price or value of any assets other than a debt shall be subject to such deductions for depreciation as are necessary to reduce the asset to its written down value and, in the case of a debt, the nominal amount of the debt shall be subject to any deduction which has been allowed in respect thereof for income-tax purposes.

(3) *Where the price of any asset has been satisfied otherwise than in cash, the then value of the consideration actually given for the asset shall be treated as the price at which the asset was acquired.*

1. Analogous Law :—Schedule 7, Part II Para 1 English Finance Act (2) of 1939 contains similar rule.

Scope of Rule 1 :—Rule 1 is a general rule indicating the amount of capital employed in the business generally to be the price of the assets or the nominal value of debts, if the latter form the assets.

2. Sub-rule (1) (a) assets acquired by 'purchase' :—Sub rule (a) of Rule (1) relates to a case where assets are acquired by purchase. The words in this sub-rule 'the price at which the assets were acquired' have to be read with sub-rule (3). In this sub-rule (3) the words 'the then value' is notable suppose the consideration for purchase was paid in the form of shares, the words then would seem to indicate the value of the shares at the time of purchase. There is no authority on the point, however. The words in the corresponding Legislation on Excess Profits Duty in the 1915 Finance Act, is (Fourth Schedule Part III Para 3 are clear. They are 'value of the consideration at the time the asset was acquired'. Again, for the purposes of application of this Rule, it may not be very easy to identify the assets to be valued. The assets may have undergone a change, due to improvement in or addition to it.

In an English case, *Sungi Rinching Rubber Co., Ltd. v. C. I. R. (1925) 133 L. T. 610*, a rubber company having purchased a jungle, an uncleared land, transferred it into a rubber cultivation, at all material times. It was held that the case fell within sub-rule (3) of Rule 1 that the purchase price of not an uncleared jungle but of a rubber estate was to be taken into account in computing capital.

The question, however, is one of fact (as held per Lord Wrenbury 1628 A. C. 283,291). In the above case, it was held

that the asset did not lose identity necessarily because of the developments made to it. In the above case it was made clear that the only question to be considered was whether, by the improvements or additions made, a new estate had been created, whereby the case goes out of clause (a) and passes into clause (c). If the case is covered by clause (a), the price at which the asset was acquired is to be considered, nothing being allowed for expenditure on improvements or additions *i. e.*, which is to be considered only if the case falls within (c) clause.

3. Sub-rule (1) (b) being debts:— In case the assets are the debts due to, *i. e.* debts which the person carrying on the business is entitled to recover deductions allowable under Income-tax Act shall be allowed in respect of debt also. Only the nominal amount of debt is to be taken into consideration.

Sub-rule (1) (c) "Value of the assets". This would mean the market value of the assets.

Sub-rule (2). Income-tax deductions from the nominal amount of debts forming assets shall be taken into account under the sub-rule.

Sub-rule (3). Where the price for any asset is not paid in cash, the value of the consideration given *actually* for the price would be treated as the price of the assets. See also notes under (1) (a) *ante*.

Rule 2. (1) *Any borrowed money and debts shall be deducted, and in particular any debt for income-tax or super-tax or for excess profits tax in respect of the business shall be deducted ;*

Provided that any such debt for income-tax or supertax or excess profits tax shall, for the purposes of this Schedule, be deemed to have become due—

(a) *in the case of income-tax, and supertax on the last day of the period of time within which the tax is payable under Section 45 of the Indian Income-tax Act, 1922 ;*

(b) *in the case of excess profits tax, on the 1st day after the end of the chargeable accounting period in respect of which the tax is assessable notwithstanding that the excess profits tax may not have been assessed until after that date.*

(2) *Where any debt for the excess profits tax assessable in respect of any period is to be deducted under this rule, the amount thereof shall not be reduced as the result of any relief to be given in respect of a deficiency of profits occurring in any subsequent period, and the amount of any such relief shall be treated as having become an asset of the business on the first day after the end of the chargeable accounting period in which the deficiency occurred.*

1. **Analogous Law:**—The corresponding English rule is Para 2, Part II, Schedule 7, Finance Act 2 of 1939.

2. **Scope of Rule 2:**—Rule 2 allows deduction of borrowed money and debts (*i. e.* debts payable by the business). Income-tax, Super-tax and Excess Profits Tax are also to be deducted as debts of (*i. e.* due by) the business in question. The proviso clears up and fixes the particular income-tax, super-tax and excess profits tax to be deducted, under the Rule.

Sub-rule (2) makes provisions for determination of excess profits tax in case of deficiency that may occur subsequently.

3. **Sub-rule (1) 'Debts':**—The term 'debt' under the Excess Profits Duty law of the United Kingdom (Schedule 4 Part III, para 11, Finance Act, 1915) was held to mean debts in the proper sense of the term and not as a mere synonym for liabilities, in general¹. Similarly, in the same case it was held that 'borrowed money' meant 'real loan', a sum actually borrowed. The expression 'debt' for income-tax.....in respect of the business might seem not to be very clear. Apparently, the words, 'in respect of the business' confirm the term income-tax to tax payable on income computed under Section 10, Income-tax Act 1922 (just like income taxable under Schedule D in the United Kingdom law)

(1) *Port of London Authority v. G. I. R.* (1923) A. C. 507 (514).

4. Sub-rule (1) Proviso :—The proviso relates to the period of time when the debt for income-tax or super-tax or Excess Profits Tax becomes due. The date under clause (a) in respect of income-tax and super-tax is to be the one when the same is payable, under Section 45 Income-tax Act. The date under the English Act is different, being normally 1st July in the year of assessment for which tax is assessable. In case of late assessment, it is due on the day next after that on which assessment is signed and allowed (English Income-tax Act, 1918, Section 157).

Under Section 45 Income-tax Act, 1922 income-tax is usually payable on the date mentioned in the notice of demand under Section 29 of the Act or if no date is mentioned in the notice then or before the first day of the second month following the date of service of notice.

Under clause (b) Excess Profits Tax the end of chargeable accounting period marks the time. The day after that is the date on which Excess Profits Tax is treated as a debt irrespective of whether it is assessed upto that date or not.

5. Rule 2 sub-rule (2) :—This sub-rule relates to a case where deficiency relief has been given under Section 7 of the Act. The sub-rule points out that in such a case the computation of capital employed in the business shall not be re-opened on the ground that the debt for Excess Profits Tax taken was greater than it actually was. The deficiency relief shall be treated as an asset in the chargeable accounting period not following the one in which the deficiency occurred.

Where the amount of deficiency exceeds the aggregate amount of the Excess Profits Tax chargeable for previous chargeable accounting periods and there is a balance of deficiency to be carried forward as under Section 7 (b), any such balance shall not be deemed to be included in the words 'the amount of any such relief'.

Rule 3. *Any investments the income from which is by virtue of the provisions of the First Schedule not to be taken into account in computing the profits of the business, and any moneys not*

required for the purposes of the business, shall be left out of account, but where any investments in the beneficial ownership of the person carrying on the business are so left out of account, the sum (if any) to be deducted under the last preceding rule in respect of borrowed money shall be computed as if the principal of the borrowed money were reduced by the value of those investments :

Provided that where the person carrying on the business is not a company, no reduction shall be deemed to be made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and the interest thereon.

1. Analogous Law :—The corresponding Rule under the English Law is Rule 3 Schedule 7 Part III Finance Act 2 of 1939.

2 Scope of R. 3 :—Investments disregarded in computing profits and moneys not required for purpose of business shall not count towards capital employed in business. The provisions of this rule would affect those of the preceding rule relating to deduction in respect of borrowed money.

War loan holdings of a partnership business, though intended to be realized when occasion should arise, with the object of employing the proceeds of sale in the trade or business have been held to be investments and have been deducted in computing the amount of capital employed in trade or business. ¹ Similarly treasury bills ² and shares and debentures held in companies ³ and investments in British Government securities ⁴ were so held and were excluded from capital employed in business. Advances, however, made without security and carrying no interest made by a coal company to a colliery were treated as capital laid out in business. ⁵

1. *Bourne and Hollingsworth v. C. I. R.* 12 T. C. 488 (486, 492, 493)
The Lincoln Wagon and Engine Co., Ltd. v. C. I. R. 12 T. C. 494 (501
 502, 508).

2. *The Lincoln Wagon and Engine Co., Ltd. v. C. I. R.* 12 T. C. 494, 501, 502, 506
 T. C. 494.

3. *C. I. R. v. The Gas Lighting Improvement Co., Ltd.* 12 T. C. 503.

4. *Liberty and Co., Ltd. v. C. I. R.* 12 T. C. 630 (634, 645).

5. *James, Waddie and Sons Ltd. v. C. I. R.* 12 T. C. 118, 120, 122.

The question whether a company was an investment company or not was held to be one of fact.¹

The proviso relates to the case where it is not a company that carries on business. In such a case reduction as above stated shall be made only if the investments are mortgaged, charged or pledged as security for repayment of principal sum borrowed and interest.

3. 'Investment.' The term 'investment' here has no particular or technical meaning and is used in the general sense. See also notes under R. 4 (1) *post* of this Schedule.

4. 'Moneys not required etc':—Not only are investments excluded from the operation of computation of capital by this Rule, but the Rule also excludes money not required for purposes of business. The expression, 'though seemingly paradoxical has a meaning which is intelligible. Apparently, the words are intended to make it clear that assets to be left out of account in computing capital would also include such moneys as may not be required for immediate use in the business and which may consequently be invested, to be drawn upon and used when needed, e.g. liquid securities kept available for meeting further commitment. See the case of *Liberty Co., Ltd. v. C. I. R.* 12 T.C. 630 and other case above cited under Scope note 2 of this Rule.

Rule 4. Notwithstanding anything contained in Rule 3, in the case of the business of shipping, to which this Act applies, the sale proceeds of any tonnage sold or the amount of compensation in respect of loss of ships or the amount of accumulation of reserves, whether invested or not, shall be taken into account in computing the average amount of capital employed in such business :

Provided that any income received from investment of such funds shall be included in computing profits for purposes of the excess profits tax.

1. 12 T. C. 494 above cited.

This rule together with the proviso was added in the Assembly at a motion by an Honourable Member. It relates to shipping industry. The moving Honourable member, in proposing the addition of this Rule observed:—"The position of the shipping industry, particularly the Indian shipping industry is of momentous importance during the war particularly. Ships are requisitioned for war services and if they are lost, it is difficult to replace them. It is also not always practicable to utilise the reserves for depreciation for replacement of old ships, the cost of replacement under conditions of war being a very important factor. It is, therefore, quite essential that funds lying with shipping companies either as cash or as investments being the proceeds of the sales or the amount of compensation for losses of ships or the accumulation of the amounts of depreciation should be treated as capital employed in the business. Unless such a consideration is shown, the position of the shipping industry will be rendered very difficult. It must be remembered that even after the war for a few years, at any rate, the cost of replacement is going to be substantially higher than it would be the case under normal circumstances."

In this connection the report of the Joint Taxation Committee of the Chamber of Shipping and the Liverpool Steamship Owners' Association is of interest. They say:—"A special reserve should be allowed out of profits to replace vessels lost during the war, or vessels in commission at the end of the war, which would have to be replaced at a cost which would exceed the cost of the fleet replaced and this is of paramount importance if the shipping industry is to be maintained after the war. The creation of any such reserve should not be confined to the excess profits tax provisions, but provided for if necessary against the national defence committee."

The Honourable the Finance Member in accepting the proposed addition observed that the amendment embodied a reasonable principle.

Rule 5. For the purpose of ascertaining the average amount of capital employed in a business during any period, the profits

or losses made in that period shall, except so far as the contrary is shown, be deemed—

(a) to have accrued at an even rate throughout the period; and

(b) to have resulted, as they accrued, in a corresponding increase or decrease, as the case may be, in the capital employed in the business.

1. **Analogous Law:**—The English Finance Act 2 of 1939 R. 4, Part II, Schedule 7 is the same.

2. **Scope of Rule 5:**—The rule relates to the accrual of profits and losses during the period the average amount of capital employed during which is to be computed. The rule lays down that the sum or even rate shall be deemed to apply both to profits and losses during such period. Naturally, such profits and losses would affect the amount of the capital, by way of increase or decrease as the case may be.

In view of the words 'even rate' used in clause (a), the effect of this Rule, which has been taken bodily from the English law, illustrated by example, would seem to be this. Suppose profits amounting to Rs. 60,000 are made in an accounting period, consisting of the year which ended on 31st December, 1940, then taking the profits for one month, which would be 1/12th part of above sum, it would amount to Rs. 5,000 for one month.

Taking the words of clause (a) of the Rule into account, it would mean Rs. 30,000* for 11 days (being $\frac{1}{2}$ * of Rs. 60,000

*If the profits made during the whole year amounting to Rs. 60,000, the increase of capital at an even rate will be worked out as follows:—

1.	Suppose the increase in the average capital in the beginning of 2nd month	5,000	being the profit of 1st month
2.	" " 3rd "	10,000	" 2nd month & previous month
3.	" " 4th "	15,000	" 3rd month & previous months
4.	" " 5th "	20,000	" 4th month "
5.	" " 6th "	25,000	" 5th " "
6.	" " 7th "	30,000	" 6th " "
7.	" " 8th "	35,000	" 7th " "
8.	" " 9th "	40,000	" 8th " "
9.	" " 10th "	45,000	" 9th " "
10.	" " 11th "	50,000	" 10th " "
11.	" " 12th "	55,000	" 11th " "

By adding the above average, we get Rs. 55,000

The increase in the average capital employed at even rate is 1/11th of Rs. 550,000=50,000.

a-month. This would be in addition to the average amount of capital employed in the year up to December, 1940. As the above figure is for 11 months only and (not for 12 months of the whole year) the last month i.e. December, 1940 having been left out of calculation, as the profits of the last month i.e. that December 1940, could not have been employed at all in the business in respect of the year which begin on January, 1940. This is the calculation on the basis of 'even rate' throughout the period'.

Circumstances may, however, arise where this basis of calculation may not hold good and in such cases some other basis may have to be adopted as is possible according to the words, 'except so far as the contrary is shown' according to the rule.

To take an illustration of the above case:—Suppose the entire amount of profits, Rs. 60,000/- has accrued during the period from 1st September, 1940 to 31st December, 1940, owing to war the income and expenses during the remaining eight months (1st January, 1940 to 31st August, 1940) having been equal. The increase in the average amount of capital employed in the business would be Rs. 30,000/- taking the even rate 'into account' for four months i.e. increase in capital. The average amount of the capital during the whole year will be Rs. 10,000. i.e. $\frac{1}{3}$ rd of Rs. 30,000.

An extreme case would be where in a business (say of an agent) the entire amount of profits occurred on the last day of the year of the accounting period, say 31st December, 1940, by way of receipt of commission of a sum of Rs 60,000 on that date. In such a case, there will be no increase in the average amount of capital, the profit having accrued in its entirety on the last day. i.e. 31st December, 1940. In the above illustrations it has been assumed that the profits were allowed to be used in the business for the entire accounting period up to 31st December, 1940. There may, however, be cases where sums be withdrawn from profits or dividend paid to shareholders in cases of companies.

Naturally, therefore, in such cases the capital will not be increased to the full extent of the profits that accrued but only to the extent that they (*i.e.* profits exceeds the withdrawals made or dividend paid).

Rule 6. *Where, in accordance with the second proviso to Section 5 of this Act, this Act is applicable to part only of a business, the capital employed in that part shall be computed separately from any other capital of the person carrying on the business, and all references to capital employed in a business shall be construed as references to capital employed in that part of the business only.*

This rule relates to a special case, where the Act is applicable only to a part of the business, of a non-resident, which in view of the second proviso to Section 5 is to be deemed to be a separate business. Capital employed in such a business would be computed separately in regard to the particular part to which the Act is applicable.

SCHEDULE III.

[SEE SECTION 9 (7)].

Rules for determining the amount of capital held by a company through other companies.

1. *Where, in the case of a number of companies, the first directly owns ordinary share capital of the second and the second directly owns ordinary share capital of the third, then, for the purposes of this Schedule, the first shall be deemed to own ordinary share capital of the third through the second and, if the third directly owns ordinary share capital of a fourth, the first shall be deemed to own ordinary share capital of the fourth through the second and third, and the second shall be deemed to own ordinary share capital of the fourth through the third, and so on.*

General:—Schedule III relates to a special case of companies holding capital through other companies. How the process may be carried on is detailed in Rule 1 clearly.

Section 9 *ante* covers the entire case of such companies one of which is the principal or the parent company and the other or others—for there may be a number of them termed ‘a series’, ‘subsidiary’ or ‘subsidiaries’.

The Rules in this Schedule have to be read in the light of Section 9, taken as a whole, and in particular with reference to Section 9(8). The underlying principle of Section 9 is that (like profits and losses) the capital employed in the business of the subsidiary company/companies shall be treated as the capital of the principal or parent company.

This is also the United Kingdom law, as laid down in Section 17 Part III, Finance Act 2 of 1939, which is analogous to Section 9 of the Excess Profits Tax Act, 1940. All the Rules in Schedule III are a *verbatim* copy of the provisions of the United Kingdom Finance Act, 1938, Fourth Schedule Part I (provisions for determining amount of capital held through other bodies corporate), with the one exception that the word 'body corporate' is used in the United Kingdom Finance Act, where the word 'company' is used in the Rules in this Schedule.

Rule 1. Rule 1 is a general rule explaining what is meant by 'holding through'. This is explained not only when there is one but there are more than one subsidiary companies.

The first one is a simple case where there is only one subsidiary company. The first company owning directly the ordinary share capital of the second is the principal or parent company and the second, the subsidiary company. Now take, the case where there is one parent company owning directly the ordinary share capital of the second and the latter directly owing the ordinary share capital of the third. In such a case, the first shall be deemed to own ordinary share capital of the third through the second. If there is a fourth subsidiary company the first shall be said to own the share capital of the fourth through the second and third and second being deemed to own that of the fourth through the third. The process may be continued as above indicated, so as to form 'series' of such companies.

The above rule would be better understood by a concrete example.

Suppose company S owns ordinary share capital of Company T

"	T	"	"	"	"	"	X
"	X	"	"	"	"	"	Y
"	Y	"	"	"	"	"	Z

then S is supposed to own ordinary share capital of X, Y, Z, companies,

T.....of Y & Z

X.....of Z.

Rule 2. In this Schedule—

- (a) *any number of companies of which the first directly owns ordinary share capital of the next and the next directly owns ordinary share capital of the next but one and so on, and, if they are more than three, any three or more of them, are referred to as 'a series' ;*
- (b) *in any series—*
 - (i) *that company which owns ordinary share capital of another through the remainder is referred to as 'the first owner' ;*
 - (ii) *that other company the ordinary share capital of which is so owned is referred to as the last owned company.*
 - (iii) *the remainder, if one only, is referred to as an 'intermediary' or, if more than one, is referred to as a 'chain of intermediaries' ;*
- (c) *a company in a series which directly owns ordinary share capital of another company in the series is referred to as an 'owner' ;*
- (d) *any two companies in a series of which one owns ordinary share capital of the other directly, and not through one or more of the other companies in the series, are referred to as being directly related to one another.*

According to clause (a) of this Rule, any three or more of such companies as own ordinary share capital on the line above indicated, are referred to as '*series*'

Clause (b) of this rule explains the *denomination* of the various companies thus connected by holding ordinary share-capital of the other or others.

These are (i) the first owner, (ii) the last owned and (iii) the 'intermediary' or 'chain of intermediaries'. The explanation of all these is very simple. According to clause (c) 'owner' is the company which owns the ordinary share capital of another, irrespective of its position, in the chain of the series. While, under Clause (d) one owning the ordinary share capital and the one whose share capital is owned are said to be 'directly' related to one another. S. directly owns share capital of T, T owns that of X, X that of Y and Y of Z being more than three number, here is a series in terms of Rule 2 (a). In the above series, S is the first owner Z is the last owned company T, X and Y are intermediaries. S is the owner of T. T, of X and so on.

Rule 3. *Where every owner in a series owns the whole of the ordinary share capital of the company to which it is directly related, the first owner shall be deemed to own through the intermediary or chain of intermediaries the whole of the ordinary share capital of the last owned company.*

This Rule relates to the holding of the 'whole' of the ordinary share capital. The position of the interconnected 'companies' remains the same. It is only the amount of the share capital which the Rule fixes or specifies, the same being the 'whole' of the ordinary share capital as against a part or fraction, which forms the subject of the succeeding Rule.

This rule is simple enough. Suppose :—

S	owns	the	whole	of	the	ordinary	share	capital	of	T
T	"		"		"	"	"	"	"	X
X	"		"		"	"	"	"	"	Y
Y	"		"		"	"	"	"	"	Z

then S is supposed to hold the whole of the ordinary share capital of Z.

Rule 4. *Where one of the owners in a series owns a fraction of the ordinary share capital of the company to which it is directly related, and every other owner in the series owns the whole of the ordinary share capital of the company to which it is directly related, the first owner shall be deemed to own that fraction of*

(c) *through a chain or chains of intermediaries of which one or some or all are not members of that series ;*
or

(d) *in a case where the series consists of more than three companies, through an intermediary or intermediaries which is a member or are members of the series, or through a chain or chains of intermediaries consisting of some but not all of the companies of which the chain of intermediaries in the series consists ;*

then, for the purpose of ascertaining the amount of the ordinary share capital of the last owned company owned by the first owner, all those fractions shall be aggregated and the first owner shall be deemed to own the sum of those fraction.

Rule 6 :—While the process to be employed in cases covered by Rule 5 is that of multiplication of the various fractions, the process in cases covered by Rule 6 is that of aggregating or adding the various fractions the sum total of these being the share of the first owner.

The details of the holding of fraction in the cases covered by Rule 6 are the result of all permutations and combinations that are possible in the case of series of subsidiary companies. To take examples of all the four cases :—

(a) Suppose

1.	S	owns	30	p. c. of the ordinary share capital of	Z
2.	S	"	60	"	T
	T	"	40	"	X
	X	"	30	"	Y
	Y	"	20	"	Z

S. owns 30 per cent of the ordinary share capital of Z directly.

S also owns indirectly 1·44 p. c. of the ordinary share capital (i. e. 60 p. c. of 40 p. c. of 30 p. c. of 20 full, of ordinary share capital) of Z. Thus Z is supposed to be the owner of 30 plus 1·44 share capital of Z. Illustrations of cases (b) (c) and (d) under this rule may also be obtained by the processes of multiplication and aggregation as above, following the permutation and combination system.

Part II

DIGEST OF CASES

under

United Kingdom Finance Act (2) 1915

and

Indian Excess Profits Duty Act, 1919.

PART II

Digest of Excess Profits Duty Cases

(Under United Kingdom Finance Act No. 2 of 1915.)

ACCOUNTING PERIOD.

Section 38(2), Finance Act, 1915 and Section 51, Finance Act, 1916—Accounting Period, computation of —Books actually made up quarterly.

Assessee company used, as a matter of practice, to have their books audited annually on 31st August, each year, stock being taken at that date and a full statement of accounts being drawn up. This practice was followed up to 31st August, 1915. The trade books of the company were totalled every month and balanced every quarter and, apart from the actual taking of stock, such books contained a complete record of the whole of assessee company's trade, including purchases, wages and sales for each quarter. On being served with the usual requirement to make a return for Excess Profits Duty in respect of the accounting period or periods of its trade or business before 1st July, 1915, its return was received on the 15th April, 1916, being for the accounting period of 12 months to 31st August, 1914. About April, 1916, quarterly account to 30th November, 28th February, 31st May and 31st August, commencing with the quarter from 1st September to 30th November, 1911 and ending with the quarter, 31st August, 1915, were prepared and were sent to Commissioner, Inland Revenue on 23rd June, 1916. The figures in these accounts were taken from totals in the books, with the exception of the stock item but the stock was not taken at any date other than 31st August in each year and no proper or complete stock accounts were kept. The value of the stock at the end of each quarter was estimated by taking the value of the stock at the preceding actual stock taking and deducting from that amount the value of the goods sold during the quarter and adding the purchases of productive material plus manufacturing costs and wages during the same period.. Such "value of the goods sold" was taken at the figure of the sales

in the book for the quarter less a percentage of gross profit. The gross profit, the percentage of which was so deducted from the sale in each quarter, was the rate of gross profits earned in the year to 31st August. The company contended that on the above facts the stock was ascertained accurately and that the profits could be and were really ascertained. It, therefore, contended that it was entitled under Section 51, Finance Act, 1916, to substitute accounting period to 31st May, in lieu of the yearly accounting period ending 31st August and to have the pre-war standard amended accordingly.

The Commissioners came to the conclusion that the profit for each quarter shown in the quarterly accounts was not the profits for that quarter but merely the profits for the year distributed over the quarters of the year and that it was impossible from books kept as they were by the assessee company and from such quarterly accounts, to ascertain readily, or indeed to ascertain at all, with any approach to accuracy, the profits of such quarter without either actually taking the stock or without keeping elaborate and accurate stock accounts. Section 51 Finance Act 1916 was, therefore, held not to apply.

On appeal the King's Bench and the Court of Appeal both upheld the Commissioners finding, holding that it was justified on evidence.

The James Cycle Co., Ltd. v. The Commissioner Inland Revenue.

12 T. C. 98 (101, 103, 104, 105).

Finance Act, 1915 Section, 38(2) and Finance Act 1916, Section 51—Accounting period, computation of—Books actually made up and audited on 31st August, each year—Construction of Section 51.

Assessee company was registered in England on the 29th March, 1895. It had been the practice of the company to have its books audited annually on 31st August, each year, stock being taken and a full statement of accounts being drawn up. Such accounts included a profit and loss account showing the results of the company's trading after deduction of expenses and a balance sheet showing the position as regards its capital assets

and liabilities. This practice was followed up to 31st August, 1915, but not at any intervening date or dates. On assessment to Excess Profits Duty for the accounting period of one year, ending 31st August, 1914, the pre-war standard of profits was arrived at by taking the statutory average [under Section 40(2), Finance Act, 1915] of the 2 years ending 31st August, 1912 and 31st August 1913, these being the years most favourable to the company.

In preparing the accounts to 31st July, 13, 14, and 15, accounts were arrived at by taking an account of the profits or losses of the month of August and each of the years 1912, 13, 14 and 15 and amending accordingly the audited accounts. Stock was not taken on any date other than 31st August in each year. The value of stock at 31st July was computed by taking the stock value as computed at 31st August following and adding or deducting to or from the account as the case might be, the difference between the value of goods sold during August and the purchase plus manufacturing costs and wages during August.

According to the witnesses, any stock taking was at best approximate.

The company claimed that they had a legal right, on the above-mentioned facts, to elect, under Section 51, Finance Act, 1916, to substitute accounting periods ending on 31st July in lieu of accounting periods on 31st August and to have the pre-war standard and subsequent computations amended accordingly.

The Revenue contended that the company could not so elect and that the 12 months to 31st August 1914, was the first accounting period prescribed by the Act. The Commissioner, having taken time to consider the matter, came to the conclusion that Section 51 did not give any right of election to the tax-payer or the Revenue, but enacted that if the books had been made up so as to come within its operation, the period for which they had been so made up shall be taken as an accounting period. In the case in hand, the Commissioner observed, as whatever was done was

repeated monthly, it would follow that each year there would have to be 12 assessments for one year. The wordings of Section, though not quite clear, yet, left no doubt that this could not be the intention of the legislature.

The Commissioners were, therefore, of opinion that the books of the assessee company were not actually made up within the meaning of Section 51, Finance Act, 1916, to any date other than 31st August for or during the year commencing 1st September 1913 and ending 31st August, 1914 or any part thereof. They, therefore, confirmed the assessment. The finding was upheld by the King's Bench Division also.

An appeal having been given notice of, to the Court of Appeal, the appeal was not pursued later by the assessee company.

John Marston Ltd. v. The Commissioner Inland Revenue.

12. T. C. 106 (110, 112).

ADDITIONAL ASSESSMENTS

Finance Act, 1915, R. 5, Part IV, Schedule IV—Exercise of discretion by Commissioner Inland Revenue, under—Commission dependent on profits payable to directors—Shown for one year in income-tax return—Not referred to for Excess Profits Duty purposes—Additional assessment to Excess Profits Duty in subsequent year valid.

Assessee company carried on the business of oil, colour, paint and varnish manufacturers etc., at Glasgow and elsewhere. By an agreement, two of the company's directors were to receive, in addition to salary, a further remuneration by way of commission at 10% on the balance of company's profits after deducting depreciation etc., and at 10% dividend payable to shareholders.

In the accounting period ending 31st December 1916, the two directors each received commission amounting to £4,570-3-5 and, in the accounting period ending 31st December, 1917 a commission amounting to £4992-16-6 in addition to their salaries under the agreement. The company was duly assessed

to income-tax on the statement of account submitted by its Secretary to the Surveyor of Taxes, in respect of the year 1916.

The items, under heads 'salaries' and 'commission' in the said account of 1916 included the amount under these two heads paid to the two directors but they were not detailed separately; nor were they so detailed in the account and return supplied to the Surveyor on 28th June, 1917.

In the return, however, made on 3rd May, 1917, by the secretary of the assessee company, under Section 21, Finance Act, 1907, to the Assessor of Income-tax, showing the persons employed and payments made to them, the commission paid to these two directors was specifically set out. In May, 1918, when copies of accounts for the period ending 31st December, 1917, were furnished by the assessee company to the Surveyor of Taxes, the latter learnt of the commission paid to the two Managing Directors in the accounting period ending 31st December, 1916.

Thereupon, an additional assessment of Excess Profits Duty was made in respect of the amount of the above commission which was formally, at the time of assessment to Excess Profits Duty for 1916, was allowed as a deduction, unwillingly.

Thereupon, the assessee contended that the term "remuneration" in Para. 5, Part 1, Schedule IV, 1915 Act, included both salary and commission and that in making the original assessment in 1916, the Commissioner of Inland Revenue may be taken to have exercised the discretion conferred upon them by Para. 5, Part 1, Schedule IV and that, therefore, there was no power left in them to make an additional assessment in respect of payments allowed already as deduction in the original assessment. The special Commissioner, on appeal, disallowed the above contention, upholding the Crown's contention that the additional assessment was valid and that no discretion such as vested in the Inland Commissioners was exercised by them in making the original assessment.

On a case being stated, the Court of Sessions also upheld the special Commissioner's decision that the additional assessment was valid.

Thos. Hinshelwood & Co. Ltd. v. The Commissioner Inland Revenue.

12 T. C. 417, (423, 426).

AGENT—LIABILITY TO E. P. D.

Section 31, Finance Act, 1915 Agent, chargeability of to Excess Profits Duty—Scope of Section 31 (6).

Section 31, Finance Act, 1915, provides that in the case of factor, agent, receiver or manager, he should be chargeable, although he may not have been in receipt of profits or gains of the non-resident.

Section 31 (6), however, places a limitation upon the provision of Section 31, by providing that an agent is to be charged for profits or gains on transactions carried out through him and only if he is an authorized person carrying on a non-resident's regular agency.

Where the business of steamship line was carried on, a line of steamers coming in, for cargo or passengers, and the steamship line was a big one and the assesseees were the only people that the steamship line (non-resident) had in the United Kingdom, they were supposed to carry regular agency and to be "authorized person" within the meaning of Section 31 (6), Finance Act 2 of 1915. They were held to have been rightly assessed in respect of the cargo put on board through them, whether they received the freight or not.

It was also held, in this case, that where the persons charged as agents, described themselves as agents on their letter paper, where they carried out the shipping of goods, the unshipping thereof, the turning round of the steamer on which the foreign company was performing services for which the freight was receivable and they collected all outward freights, such persons were "authorized person", within Section 31 (per

Scrutton L. J.) "It is odd language, of course, because how you can carry on agency if you are not authorized, I do not quite understand, and what was the object of putting in the word "authorised" I do not follow. The emphasis I lay on the term "regular".

Nielsen, Anderson & Co. v Collins and (2) Tarn v. Scanlan.

13 T. C. 91 (110 122, 125)=42 T. L. R. 420=135 L. T. 744=42 T. L. R. 704=97 L. J. K. B. 267=138 L. T. 241=44 T. L. R. 53=1928 A. C. 34.

AGENT—ASSESSMENT, PRINCIPLE GUIDING OF.

Section 31 (7) Finance Act 2 of 1915—Place of contract—conclusive—existence of trade being carried on—Principle guiding assessment of agent.

The fact that a contract is made in England is almost conclusive that a trade is carried on here, but if neither party is resident of United Kingdom assessment can only be made in the name of the agent who received in England the profits of the transaction. In particular, a contract for carriage made abroad between non-residents of which a substantial part is to be performed in United Kingdom, including receipt of freight by an English agent does not seem to get any protection from Section 31 (7). A contract for shipment made in United Kingdom the only parties to which are non-resident, and the freight on which is payable abroad, is not protected. It is otherwise, however, if any party to such a contract is a resident, in that case it is immaterial where freight is payable. In cases which are otherwise protected by sub-section (7) the English agent must receive the profits of the transaction to render. His foreign principal is liable to assessment in the agent's name. These principles and the consideration of the completed documents should enable a just conclusion as to the amount in which the agent is assessable to be arrived at.

W. H. Muller (London) v. Lethem.

13 T. C. 126 (151,152).=44 T. L. R. 53=1928 A. C. 34=97 L. J. K. B. 267=133 L. J. 241=(1927) 1 K. B. 780=96 L. J. K. B. 4=186 L. T. 107.

Note:—See also under non-resident.

APPEAL—ENHANCEMENT OF, ASSESSMENT ON.

Section's 40, 44 & 45 – Schedule IV, Part 4, R. 5 Remuneration paid to sons of the proprietor of business.—Deductibility from profits—Extent—Special Commissioner's power to enhance assessments in appeal.

Assessee carried on the business of waterproofing materials. For the last thirty years he had been the sole proprietor of it. Later, he employed three of his sons with him in different capacities. Upto 1910, they were paid solely by salaries upto about £150 per annum each. In 1910, by an agreement, two of them were to be remunerated out of profits, a sum equal to 25% of the net profits being paid to them. The agreement was for three years but was acted upon thereafter also, though not formally renewed. In the course of 1912, a third son, who was so far taking a salary of £3 per week, was by verbal arrangement, to take 25% of the net annual profits. Thus the three sons took 75% and the assessee himself 25% out of the profits.

Assessee managed the entire business himself. The sons were not consulted in matters of policy and had no hands in the management of the business.

Additional assessment was made on the assessee by revising the deduction on account of sons' remuneration to which the assessee objected.

One of the sons was permanently invalid but he admittedly received his full remuneration, even for the large period he was abroad. Assessment to income-tax under Schedule D was made in the original assessment to Excess Profits Duty, the assessing Commissioner followed the income-tax basis and regarded the full remunerations of the sons as an admissible deduction.

It was contended that the Commissioner could not raise the additional assessment in appeal by revising the deductions allowed in the first assessment. The special Commissioner disallowed the assessee's objection as to additional assessment.

For the assessee it was contended that the arrangement under which the sons were getting the remuneration was not "artificial", nor had it reduced the profits artificially within Section 44(3), the same being inapplicable.

The special Commissioner held that the assessee was the sole proprietor of the business, that the sums paid as remuneration to the sons was not wholly and exclusively laid out for the purposes of business, that a sum of £750 per annum constituted the remuneration of the three sons which was deductible. The special Commissioner accordingly increased the additional assessment. On appeal, held (per *Rowlett J.*) by the King's Bench Division, the above finding was upheld.

Johnson Brother & Co. v. The Commissioner Inland Revenue.

12 T. C. 147 (159, 160, 161, 166) = (1919) 2 K. B. 717 =
121 L. T. 643 = 82. L. T. K. B. 94

APPEAL—JURISDICTION.

**Sections 45(5) and 40(2)—Standard to be adopted—
Appeal lies to Special Commissioner.**

In the above case, the assessee, the Port of London Authority, applied to the Inland Commissioner for assessment to Excess Profits Duty being made on percentage standard, as provided for in certain cases by Section 40(2), Act 1915. This was not acceded to by the Inland Commissioner, as it was said by the latter that it was not proved to their satisfaction that the amount of profits arising from the trade or business carried on by the assessee on a profit standard less than the percentage standard.

On appeal, the assessee urged that they were entitled to assessment on percentage basis. The special Commissioner, however, declined jurisdiction with regard to this point, as no appeal, they thought, lay to them on that point. Their decision on the point was upheld by the High Court, *i.e.*, the King's Bench Division (per *Rowlett J.*).

On appeal, the Court of Appeal held that an appeal lay on the point. As a reason for this, they observed:—(*per Lord Sterndale M. R.*)

"I think it should be open to review, first on this ground. An appeal is given against the amount of the assessment. On very important element in such an assessment is the basis on which it is made and if the basis be wrong, it is difficult to see how the amount of the assessment can be right. There are too possible basis for the assessment of post-war profits *minus* pre-war profits standard and post-war profits *minus* pre-war percentage standard; and the first element the assessing authority has to determine is which is the basis to be adopted. When that is determined the amount of the pre-war and post-war profits have to be ascertained, the one deducted from the other and the assessment, completed...I do not agreein considering this decision of the Commissioner a matter collateral to the assessment; I consider it the determining of a necessary element of the assessment, and.....as this is a taxing Act it should be determined so as not to deprive the subject of a right which in any opinion on principle he ought to have (per *Warrington L.J.*) "The true view is, in my opinion, that the expression 'to the satisfaction of the Commissioners* means to the satisfaction of the tribunal entrusted with the duty of making the assessment'. If this view of the construction of the Act is correct, then I think the decision on the matter in question is as much open to review as any other decision of the Commissioners".

(Per *Scrutton L. J.*)....."which standard should be applied is a matter to be decided by the Inland Revenue Commissioners, the assessing authority, without appeal. If they are not satisfied, no appeal lies, however wrong they may be, in their calculations.....the contention involves the result that a Government department, as an assessing authority, can fix the amount of tax to be recovered from a tax-payer without any appeal as to a vital part of the assessment. This is in my experience quite novel as a taxing principle and contrary to the language of the sub-section (5) of Section 45".

In the result, the case was remitted to the special Commissioners, on this point, to hear the appeal and decided what

* In Section 40, proviso, Finance Act, 1915.

was the proper basis of assessment and whether the percentage standard, properly calculated, was really not greater than the profit standard.

(1918) 1 K. B. 143 and (1918) 2 K. B. 720 Disting.

The Port of London Authority v. The Commissioners Inland Revenue.

12 T. C. 122 (131, 132, 136, 139, 143, 144, 145)=(1919) 2 K. B. 608=(1920) 2 K. B. 612=69 L. J. K. B. 547=123 L. T. 318=36 L. T. R. 460.

APPLICABILITY OF ACT.

Section 31(7) Finance Act 2 of 1915—Applicability.

Sub-section (7) of Section 31, Finance Act 2 of 1915, reproduced in Rule 11 of the General Rules applicable to all Schedules of the Income Tax Act 1918, also protects a non-resident trading in England from being assessed, so far as that trade consists of contracts between two non-residents, in the name of his agent here, unless that agent is in receipt of the profits of such transactions. But this Section does not apply if one party to the contracts constituting the trade is a resident, and where the ship-owner's resident agent is himself liable on the contract, or where the resident shipper though making the contract on behalf of a non-resident consignee is himself liable on the contract, the sub-section does not seem to give any protection.

W. H. Muller & Co. (London) Ltd. v. Lethem.

13 T. C. 126 (151)=44 T. L. R. 53=138 L. T. 241=97 L. J. K. B. 267=(1927) 1 K. B. 780=96 L. J. K. B. 4=136 L. T. 107.

CAPITAL EMPLOYED IN BUSINESS.

Section 41 (2) and (3) and Schedule IV, Part III, Rules 1 (b) & 2—Advance by a coal company to colliery—Made without security and carried no interest—Exclusion of advances from capital for purposes of computation of Excess Profits Duty—Advances treated as capital laid out in business.

Assessee, a limited coal company practically controlled a colliery company, owning £6,236 out of £1,000 of the

company's capital, besides holding certain of the company's debentures. They had the sole disposal of the whole of the coal company's output, for which sale they got a fixed rate of 3d. per ton commission on the sale of the company's coal. The coal was not purchased by the company but was merely sold by them in their own name to their customers. Assessee took the risk of bad debts and monthly accounts were rendered between them and the coal company of the sale and the commission.

As the coal company had been doing badly for some years, the assessee company made advances to it to provide it with sufficient resources to raise the coal. The payments were largely in excess of the sums due for coal received. Advance amounts, being £11,174 on 31st May, 1915 and £18,388 on 31st May, 1916 were without security and bore no interest; nor were they covered by any document. The said sums were equal in value to about three months supply of coal.

Assessee company contended that the advances made, being against future delivery of coal, were book debts or balance on open account, that they were temporary items in the running agency account and were not of the nature of permanent investment of capital, that they were in accordance with the practice of coal trade, that in view of R. 1(b) Part 111, Schedule IV, Finance Act, 1915, they were debts due to trade and must be treated as capital employed in business in the accounting period and alternatively, it was contended that as Excess Profits Duty was already paid on the 3d. per ton profit, and that if the advances were to be treated as investments, they brought in no profits and that by the method of computing Excess Profits Duty adopted by the Surveyor of Taxes it became a case of double taxation.

The Crown contended that the assessee company's business was that of coal merchants (*i.e.* of selling coal) and not of producing coal, for which the monies were advanced, that the sums in question, having been advanced with a view to assist coal producing through periods of stress, must be regarded as an investment and be excluded from the capital for computing Excess Profits Duty. As to the alternative plea of the

assessees it was contended that the profit from the advances accrued to the coal company and not to the assessees.

The Commissioners upheld the above contentions of the Crown and according to their view, the money so advanced was not required for the assessees' proper business. On appeal: *held*, in a commercial sense, the sums in question were employed in the assessees' business, for if they had not made the advances and had no other business they would have had no profits as agents and there would be nothing to assess and that, therefore, the Commissioners' decision was wrong.

3 T. C. 279 (285) Disting.

James Waldie & Sons Ltd. v. The Commissioners Inland Revenue.

12 T. C. 113 (116, 117, 119, 120, 122) = (1919) Sess cas 697.

CAPITAL EMPLOYED IN BUSINESS— COMPUTATION OF.

Finance Act, 1915, Section 41, Schedule IV, Part 1, R. 8 & Part 111, R. 2—Computation of capital employed in the business—Holdings of War Loan, whether such capital.

Assessees carried on in partnership a business as drapers, which had been built up with their resources. They never borrowed. Their transactions were large and the capital employed during the pre-war trade years, by reference to which the profits standard was arrived at, was £2,43,103. In December, 1914, £9,442-19-3 was spent on the purchase of war loan and the total cost of war loan held was increased to £59,784/- in the course of the year ending February, 1916. In the year ending February 1917, the cost of holding the war loan was increased to £ 134,721. In the accounting period of twelve months ending February 1918, further purchases of war loan amounting to £ 45,000 were made. No part of the war loan was realized during the accounting period; nor was the war loan actually used as security for a loan or otherwise in connection with the business.

Assessee's trade commitments also increased as they had to deal directly with manufacturers and to enter into forward contracts with them for supply of goods. For this they were required to take and pay for within a few months.

Then, in April 1916 and March, 1917, they entered into a contract, to pull down and rebuild their premises. Contracts relating thereto had to be postponed till after the war, due to restrictions imposed on account of war.

There was evidence given that in view of their liabilities under the rebuilding contract and trade commitments, the assessee could not go on with their trade without holding liquid assets which included war loan (as shown in their balance sheet). This evidence was accepted by the Commissioners.

In computing the capital of the assessee employed by them in their business the Commissioner Inland Revenue had excluded from their profits for the accounting period ending 16th February, 1918, the value of the war loan holdings from the assets, for the purposes of Section 41, Finance Act, 1915. Assessee contended that their war loan holdings were not investments and ought to be treated as capital employed in their trade or business for the purpose of Excess Profits Duty. The Crown contended *inter alia*, that these were investments and not capital employed.

The Commissioners held that the said war loan holdings, though intended to be realized when occasion should arise with the object of employing the proceeds of sale in the trade or business, were investments and had been rightly deducted in computing the amount of capital employed in their trade or business.

The finding was upheld by the King's Bench Division on appeal, finding being one of fact and of evidence.

3 T. C. 279 and 6 T. C. 359 (423, not appl.)

Bourne and Hollingsworth v. The Commissioner Inland Revenue.

12 T. C. 483, (486, 492, 493).

Finance Act, 1915, Section 41 & Schedule IV, Part 1, R. 8 and Part III, R. 2—Computation of capital employed in the business—War Loans and Treasury Bill investment, whether such capital—Question one of fact.

Assessee's company's business consisted of financing the purchases of wagons by traders desiring to use them. For the above purpose the company had to purchase wagons itself under "hire-purchase" agreement. Under this agreement, the company remained in law the owner of wagons and let them out to traders on hire. The trader was entitled to use the wagons on payment of a fixed yearly rental for a definite term and on completion of such payments could, for a sum of one shilling, become the owner of the wagons. Before the war, the company made its computations of the hire instalments or deferred payments on a $6\frac{1}{2}\%$ basis. It was itself able to borrow at a lesser rate.

During the war, the business done by the company in financing wagons decreased in volume. The capital moneys of hire, having been accumulated in the hands of the company, were placed and invested by it in treasury bills and and war loans, issued by the Government and their equivalents were included in "Stock". There was evidence, which was accepted by the Commissioners that usually one half of the business of the company was in contracts for new wagons, the other half of the business was in second hand wagons or extensions of existing contracts; the company sold wagons outright very occasionally, the company, repaired wagons at its own works; it sometimes let out wagons on simple hire agreements, the company placed the capital moneys accumulated in its hands during the war, in war loan intending to draw it out again for use in its ordinary business as soon as circumstances permitted. It was contended on company's behalf that the company was one whose principal business consisted in the making of investments and alternatively that the sum placed by the company in war loans were not investments but must be regarded as employed in the company's business. The Commissioner held that the treasury bills and war loans were investments.

that the principal business of the company did not consist of the making of investments and that the paid bills and loans had been rightly excluded in arriving at the company's capital and that the money represented by these has not been employed in fact in the company's business. On a case being stated the King's Bench Division (per *Sankey J.*) upheld the above finding, with the discretion that the question whether the company was an investment company was one of fact and guidance and that there was evidence before the Commissioners on which they could and did find that the company was not an investment company.

12 T. C. 483 ref.

The Lincoln Wagon & Engine Company Ltd. v. The Commissioner Inland Revenue.

12 T. C. 494 (501, 502, 503)

Finance Act, 1915, Sections 40 & 41, Schedule IV, Part 1, R. 8, Part III R. 2—Computation of capital for Excess Profits Duty purposes—Shares and debenture held in Companies deductible in computing capital.

Assessee company carried on the business of refining and distribution of petroleum spirit and other petroleum products.

The company held 170 shares of another company, the Belgian Benzine Company, being one third of the capital of the company. In respect of these, the company paid, under the Belgian law a total amount of £ 1,344/ in cash (10% nominal value of shares on formation and 10% on prolongation). The said shares were transferable only by a Board of Directors and by a unanimous resolution. Under two other agreements entered into between the assessee company and the Beciu (Roumania) Oil Fields Ltd., and the Stavroposteo Moreni, (Roumania) Oil Properties Ltd., respectively, the company took up in 1913, 25,000 ordinary shares in the Beciu company, paying in cash for such shares s. 7-6 d. per shares. In the same year, the company also took up in 1913, £18,825 ordinary shares in the Stavroposteo company, paying, therefore, the sum of £ 1 per share in cash and further reduced a sum of £2,000 to this

latter company on the security of debentures issued by the company.

There was evidence to the effect that the assessee company would have been unable to obtain from the Roumanian Companies above mentioned the supplies of oil required for company's trade or business unless they had agreed to assist them financially as above stated.

On a computation of the assessee company's capital employed in business, the company contended that the capital employed to acquire their holdings in the Belgian Benzine Company and the two Roumanian Oil Companies was capital employed in the trade as business of the company and should be included in computing the capital of the company employed in business. It was contended, on the other hand, by the Commissioner Inland Revenue that it was not the principal business of the company to make investment and that the shares and debentures held by the assessee company were an investment within the meaning of Finance Act, 1915, Schedule IV, Part 1, R. 8, and that under the said Rule the income from such investments fell to be excluded in estimating profits for Excess Profits Duty purposes.

The Commissioners held that the money invested as above by the company was money employed in the business of the company as capital and not as an investment. The above finding was upheld by the King's Bench Division.

On appeal, however, the Court of Appeal reversed the finding of King's Bench Division, holding that the contention of the Crown as above stated was correct. The House of Lords upheld the decision of the Court of Appeal.

5 T. C. 353 ref.

The Commissioner Inland Revenue v. The Gas Lighting Improvement Co., Ltd.

12 T. C. 503 (511,521,526,531,537,544) = (1922) 2 K. B. 381
= (1928) A. C. 723 = 91 L. J. K. B. 694 = 127 L. T. 732
= 38 T. L. R. 613.

Finance Act, Section 41 and Schedule IV Part I, R. 8 and Part III, R. 2—Computation of capital employed in business—Exclusion of investment in British Government Securities.

Assessee company carried on the business of manufacturers of and dealers in artistic fabrics and wares.

In order to extend their business, the company wanted to rebuild their premises in Regent Street, London, where they carried on their business with this object, the company accumulated their profits in a Reserve Fund which, by 31st January, 1914, amounted in round figures to £ 1,52,000.

In connection with the work of rebuilding their premises the company entered into agreements, with contractor and as the work involved demolition it was commenced before the war but the contractor defaulted the company.

Between 1916 and 1920, put to reserve further position of their profits, which was applied in the acquisition of 5% war loan, National War Boards, Victory Loan and Finding Loan. In September, 1920 the assessee deposited a part of their holdings in British Government Securities with their bankers as security for an overdraft which was paid off in March, 1921. In thus applying their surplus funds the assessee was informed by certain circulars issued by the Commissioner Inland Revenue on 12th March, 1917 and 1st July, 1919.

The pre-war standard of profits of the assessee was a profit standard and in making the assessments in question of Commissioners Inland Revenue excluded from the profits of their trade or business, for the accounting periods to 31st January, 1920 and 31st January, 1921 respectively the income of the assessee from the holdings of the British Government Securities above mentioned. Under Section 41, the Inland Commissioner also excluded the said value of the holdings from the assets of the company for the purposes of computation of their capital employed in trade or business, for the above said accounting period.

The assessesees contended that the entire sum of the above holdings, together with the sum of £ 25,003 deposited by them under the agreement of September, 1913, with the Commissioner of Woods and Forests, in connection with the contract for the rebuilding of their premises, was capital employed, in their trade or business, that their holdings of British Government Securities were not investment and the price of acquiring the same should be included in the computation of capital employed by them in their business. The Commissioner held that the British Government Securities held by the assessesees including the war loan inscribed in the joint name of the assessesees and the Commissioner of Woods and Forests were investments, to be excluded in the computation of their capital employed in trade or business. The Commissioner relied on the cases reported as 12 T. C. 483 and 12 T. C. 503 and another unreported case from *Inland Revenue (Boland Ltd. v. The Commissioner Inland Revenue)* decided on 13th June, 1918). The above finding was upheld both by the King's Bench Division and the Court of Appeal.

12 T. C. 503 ref.

Liberty & Co., Ltd. v. The Commissioner Inland Revenue.

12 T. C. 630 (634, 635, 639, 643, 645).

COMMENCEMENT OF BUSINESS

Sections 38 & 40, Sch. IV Part, 11, R. 4—Computation of pre-war standard for purposes of Excess Profits Duty assessment—Date of commencement of business.

Assessee company was incorporated on 20th June, 1913. It carried on the trade or business of usage skin etc., manufactured in Birmingham. In the month of June and July 1913, and on subsequent occasions, prior to 6th October, 1913, the directors of the company were, according to the evidence submitted, engaged in various transactions, prior to starting business, *e. g.*, viewing other places of business of a similar character in various parts of the country entering into a contract for the erection of works, purchase of machinery and plants etc. In October, 1913, the directors began to take the raw materials and turn out their product.

On assessment to Excess Profits Duty, for the accounting period from 6th October, 1913 to 5th October 1914 and from 6th October 1914 to 31st December 1914 respectively the company contended that their business commenced on the date of incorporation, viz. 20th June, 1913 or alternatively that the company had had firm to 3rd August 1914, a pre-war trade year and that under 4th Schedule, Part 11, No. 4, Finance Act, 1915, the profits shown for the period 24th June, 1913 to 30th June, 1914, or alternatively that the profits during such a period as was a pre-war trade year should be the basis for the pre-war standard in computing the liability to Excess Profits Duty.

The Commissioners were of opinion that the assessee company commenced carrying on their trade or business on 6th October 1913 and that there was not a pre-war trade year and that the assessments were rightly based on a statutory percentage on the capital employed in the business.

The above finding of the Commissioners was upheld by the King's Bench Division in appeal.

The Birmingham and District Cattle Bye-Products Company Ltd. v. The Commissioner Inland Revenue.

12 T. C. 92 96,98).

COMPUTATION OF PROFIT.

Finance Act (1915) Sections 38 & 40, Sch. 1V, Pt. 11—R. 4—Coal Mining Company—Computation of profits for excess profits duty purposes at pre-war standard on profits of two out of three pre-war trade years—Carrying on of business for more than three pre-war years justified on evidence—Computation and assessment correct.

Assessee company, registered under the Companies Act, on 28th June, 1906, carried on the business of colliery and mine owners, for which purposes it purchased, took over on lease or otherwise acquired the hereditaments and sale of coal, known as the Prince Albert and Union Cannop Engine in the Forest of Dean and County of Gloucester, together with the mines and minerals therein, and thereunder. The company acquired the lands in the Forest of Dean and commenced sinking pits in 1906. It expected the pits to produce 1,000 tons of coal per

diem, in the course of two or three years, but owing to various unforeseen causes, their expectations were not fulfilled and the pit-sinking could not be completed till late in 1911. The company's original capital proved to be inadequate and it had to borrow on the security of mortgage debentures, from the Crown and to overdraw from their Bankers.

In 1908, the company made a drift, or a sloping shaft, in the hill side, which, it was stated by the company's Chairman, was done in order to obtain the coal needed for working the pit-sinking machinery. The drift, however, in fact yielded far more coal than had been anticipated and was required for the above purpose. Consequently, the company was, from the year 1909, able to sell, and did sell, at a profit, the bulk of the coal thus obtained by the drift. According to the report of the company's directors, the drift was placed upon a working basis from 1st April, 1909. The figures of tons of coal raised from the drift for the two years ending 31st December, 1910 and 31st December, 1911 showed high figures. The pit shafts, on the other hand, were completed late in 1911 and the pits started working on revenue basis from 1st April, 1912, whereafter the drift and the pits worked together.

On the 26th February 1916, the drift ceased to be worked.

The Director's Report showed that the profits arising to the assessee company from the sale of coal obtained from the drift in the two years ending 31st December, 1910 and 1911, amounting, after meeting all expenses, and the full two years' interest on loans, to 8 per cent and 11 per cent of the company's paid up capital.

The company's income-tax returns and assessments to income-tax made on the company for 1912-13 and subsequent years did not proceed on the assumption that trade or business of the company was a new one as from any date in June, 1912, but have been based on the average of the preceding years since the year when the drift yielded profit. For income-tax purposes, the company was taxed every year from and since 1909.

On being assessed to Excess Profits Duty and, on

computation of its profits on the basis of three pre-war trade years, the company contended that there had not been three pre-war trade years of the company within the meaning of Part II (4) of the 4th Schedule to Finance Act (1915) and that the trade or business of the company did not commence till 1st July 1912 or, in any case, till 1st April, 1912, and that the company was entitled to exercise the option of taking as the pre-war standard the profits of the one year ended 30th June, 1914.

In support of the above contention it was stated that the of company was formed to obtain coal by pits and not by a drift and that it was not until 1912 (1st July or 1st April) that it was not possible to obtain coal by pits. The Crown contended that the company's object was to obtain coal and to carry on the trade or business of mining and selling coal (irrespective of the means, be it by pits or by drift) and that this business had, in fact, been carried on for more than three pre-war trade years and that hence the pre-war standard adopted was correct.

The Commissioners having considered the entire facts were opinion that the company had been carrying on trade or business for three pre-war trade years and that the computation of their profits for Excess Profits Duty purposes was correct. On appeal the above finding was upheld by the King's Bench Division (per *Sankey J.*) as, the assessee company, was on facts proved, able to raise and sell coal from 1909. Though obtained by drift, which yielded more coal than the company required and which they actually sold and raised profits from and that, as such, the company had, *in fact*, been carrying on colliery business both before and after the war.

The Cannop Coal Company Ltd. v. The Commissioner In-land Revenue.

12.T.C. 31 (38,40,41).

See also under "Profit".

CONSTRUCTION OF ACT—CHARGING SECTION.**Finance Act, 2 of 1915—Section 22 (c)—“Purchase annuity”, Meaning of—Effect of the Section.**

In this case, the lands in respect of which the assessment was made under schedule, on annual value, were purchased in 1875, under the provisions of the Landlord and Tenant (Ireland) Act, 1870. One third of the purchase money was provided by the purchaser, the other two thirds being advanced by the Commissioner of Public Works, Dublin or the Board of Works, under Sections 44, and 45 of the said Act.

In consideration of the advance made by the Board of Works, the lands were charged with an annuity of £41-2 in favour of the Board, payable for 35 years. The annuity was subsequently reduced to £ 32-17-8 and the time extended under Section 24 of the Land Law (Ireland) Act, 1887. A further reduction of the annuity has since been made by virtue of the provision of Section 25 of the Land Law (Ireland) Act, 1896. The annuity stood at £17-19-8 in 1918, the Poor Law Valuation of the land being £39-5. The assesment was leased on the Poor Law Valuation, which was less than the original annuity. The assessee contended that the annuity of £ 17-19-8 was the purchase annuity and that the assesment should be based on that amount and not on Poor Law Valuation. The assessee relied on Section 22 (c) Finance Act 1915. The Commissioner held that the amount payable the Board of Works constituted a “purchase annuity” under lands Purchase Act. In this case, as the annuity represented $\frac{2}{3}$ only of value of lands it was held by the Commissioners to be somewhat doubtful whether it fell within Section 22 (2) of the Finance Act, 1915. On a case being stated, the Court held, that the construction put on the term “purchase annuity” by the commissioners was correct that the words “annuity and originally fixed” could not be substituted for annuity payable, as the annuity originally fixed was not payable and then the amount of annuity may have been estimated year ago and there might have been change of title since then—It was further, observed. “The purchase annuity, originally, fixed if the whole purchase money had been advanced by the State might have been taken

as a basis of taxation, and the sub-section was evidently framed on the assumption that this was so, and that the purchase annuity remained unaltered since the date of the purchase."

The letter of the Act was not to be departed from, it was observed, in construing Section 32 (c) and its effect.

Corceran v. Judge.

7 T. C. 119 (120, 123, 124), (1919) 12 K. B. (1R) 60

DEDUCTION FROM PROFITS.

Excess Profits Duty, assessibility to—Loss deductible—Cost of Conversion—Loss of Capital not an allowable deduction.

The assessee company occupied work in Edinburg for the manufacture of T. N. T. under contract with the Minister of Munitions. The situation of the works being dangerous for manufacture, the production was discounted in June 1917. Thereafter, the company carried out experiments in the manufacture of Calcium Nitrate and these experiments proving satisfactory, an arrangement was entered into with the Minister of Munitions in October 1917 for the conversion of company's plants and works with the object of rendering them suitable for the manufacture of Calcium Nitrate. The arrangement was ultimately entered in an agreement dated 22nd April 1918, by which the company was to be recouped by the Ministry of Munitions for the whole cost of conversion up to a maximum of £ 15,000 which was the company's estimate of the probable cost of conversion, in the conditions then prevailing. In consideration, the works on conversion, were to be the property of the Ministry and the company was given the option to purchase the same within three months at the expiration or sooner on determination of the agreement at a valuation, else the Minister was to have the option within 12 months to remove all plants, machinery and buildings or to purchase for the company its interest in the land or any part of the buildings. Conversion commenced in November, 1917 and was carried out by autumn of 1918. The contract was determined, following upon the Armistice, towards the end of the year 1918, after only one week's output had been manufactured. Due largely to the increase in the prices of materials the actual cost of work

of conversion exceeded £ 15,000 by a sum of £ 4174 agreed to be taken at £41,044 which was written off by the company as bad debt in its accounts for half year ending March, 1921.

In October, 1924, the company raised an action against the Lord Advocate for recovery of the above loss of £ 4,174. The action was settled in February by payment to the company of £ 2087, of which 208 was absorbed by legal expenses so that the net sum received by the company was £ 1,879.

The company claimed to deduct the loss of £ 2,165 being the difference below £ 1879 and £ 4044 being the agreed excess cost of conversion, on the allegation that the net loss of the above sum was a trading loss as bad debt.

The Commissioners held that the loss was a capital loss and as such not deductible. On a case being stated the Lords of the Sessions Court confirmed the above finding of the Commissioners held that the loss was a capital loss and not deductible.

The Lohion Chemical Co., Ltd. v The Commissioner Inland Revenue.

11 T. C. 508 (512, 522, 524).

DEDUCTIONS

Finance Act (2 of 15) Schedule IV, Part. 1, R. 8 and Part 111 R. 2—Insurance company investing reserve funds—Not an investment company—Depreciation on securities made good out of profits—Not allowable as deduction—Not covered by exception to R. 8, Part 1.

Assessee company carried on Fire Insurance and Employer's Liability Insurance business. For the latter business which it started on the passing of the Employer's Liability Insurance Companies Act 1907, the company had, under the provisions of the said Act, to deposit and invest a sum of £20,000 in approved securities, which it did. It carried on the latter business from 1st July 1908. Profit and loss arising from the company's two businesses were shown separately in the company's accounts, but the two funds were dealt with as one for assessment purposes.

Prior to 1908 and subsequent thereto, the company had a reserve fund, the accumulation and additions to which upto the year 1915 amounted to £ 25,968-16-11.

Under the requirements of Section 4, Assurance Companies Act 1909, the company was required to make such provisions in its balance sheet for any reduction in value below the purchase price of any investment of which it is the owner as will enable the person signing the balance sheet to certify the assets set forth in the balance sheet to be in the aggregate fully of the value therein stated less any investment reserve fund taken into account. The company had complied with the said provision of the law and the amount of £25,968-16-11 above mentioned included the amount required as above.

All sums received by the company, except those required for immediate expenses were invested by it as soon as possible. The company had no agents and carried on the entire business by correspondence or through its Dublin Office. The risks insured by the company exceeded £12,000,000. The company was assessed to Excess Profits Duty, under Finance Act (2 of 1915) Part III, for the accounting periods of one year each ending 31st December 1914 and 1915 respectively by reference to the profits of the company as shown in its published accounts, excluding altogether from the computation both all the income received by the company on its investments and all the capital and accumulated profits represented by such investments; this was under Rule 8, Part I and Rule 2, Part III, Schedule IV of the said Act.

The company contended :

- (1) that it should be treated as a company having its principal business, the business of investment, within Schedule IV, Part 1, Rule 8.
- (2) that the accumulated profits of it should be treated as capital employed and jeopardized in the business;
- and (3) that the sum set apart from time to time for making good the depreciation in the value of securities, as required by the Assurance Companies Act, 1909,

should be allowed as deduction and that in view of the fact that all the capital and accumulated profits of the company were invested, the company was not liable to Excess Profits Duty.

The Commissioners negatived the company's contention as above stated and confirmed the assessment.

On a case being stated, as desired by the company, the King's Bench decided unanimously in favour of the Crown upholding the Commissioners' finding as not being erroneous in law and on facts justified by the evidence before them.

On appeal, the Court of Appeal also upheld the finding.
(1901) A.C. 477 appl.

Irish Catholic Church Property Insurance Co., Ltd., v The Commissioner Inland Revenue.

12 T.C. 13 (18,20,21). = (1918) 2 In. R. 510.

Section 40 & Schedule IV Part 1, R. 2 & 5—Bonus paid to directors—not a trading expense deductible—Lump sum paid to a retiring director in addition to remuneration—Not an allowable deduction.

Assessee, a registered company, carried on business at Derby, its accounts being made up annually upto 31st May.

By two resolutions dated 25-6-12 and 3-7-12 the company decided to pay surplus profits, after paying 7½% dividend and transferring £500 to reserve fund, as bonus to directors. At this time the company had three directors, each of whom was its manager also, entitled to a salary and a commission upon the net profits of the company, after payment of 10% dividend. Then, in November, 1912, one of the directors gave up his employment as manager upon the terms stated in an agreement entered into between himself and the company according to which he received immediate payment of a sum of £ 550, being the salary which he would have been entitled to as a manager under the previously subsisting agreement had he continued in the employment of the company, until the expiration of the agreement, i.e. 26th August, 1915. In addition to the amounts paid to the directors by the company in

the years ending 31st May, 1915 and 1916, the company resolved to pay the Directors a bonus or commission of £ 800 which in 1915, was charged in the company's accounts as an appropriation of the profits of the year and in 1916 was charged in the company's trading account as an additional working expense. In ascertaining the profits of the company for the purposes of income-tax, a sum of £ 350 appropriated to the Directors out of the profits for the year ending 31st May, 1912 was not claimed to be or treated as a deduction, and the tax in respect thereof thus fell to be borne by the company and was not charged upon the Directors personally.

For the purpose of arriving at the pre-war standard of profits of the company, under Section 40, Finance Act, 1915, the Commissioners deducted the said sum of £ 350 as being a working expense of the company properly allowable in arriving at the profits of the year ended 31st May, 1912.

As regards the lump sum of £ 550 paid to the retiring director, the Revenue agreed to the method of accounting adopted as to this sum in charging it to their accounts not to the year ending 31st May, 1913 only, but in various sums in the years ending 31st May, 1914 and 1915. In respect of the increased remuneration, however, paid to the managers, the Revenue refused to regard as a deduction for Excess Profits Duty, any sum paid in an accounting period in excess of the salary to which they were entitled under the agreement.

In the exercise of the discretion vested in thereunder R. 5, Part 1, Schedule IV, Finance Act, 1915, the Commissioner Inland Revenue, directed the allowance for such remuneration for the year ending 31st May, 1915 to be fixed at £ 850 but gave no direction in respect of the year ended 31st May, 1916.

Thus the questions arising in the case were :—

- (1) Whether the sum of £ 350/- is deductible in arriving at the profits for the year ending 31st May, 1912;
- (2) the amount deductible for the salary and remuneration of Directors and Managers in the year ending 31st May, 1916.

The assessee company contended :

- (1) That the computation made for income-tax purposes should be followed for Excess Profits Duty purposes also, as to the manner of treating the £ 350;
- (2) that the said sum was a voluntary payment out of profits and not necessary expenses of the company in earning profits;
- and (3) that the sum to be allowed for remuneration of Directors and Managers for the accounting period ending 31st May, 1916 should not be less than the sum allowed for that item in the last pre-war trade year.

The Commissioners decided that the sum of £ 350 must be deducted in arriving at the profits of the company for the purposes of pre-war profit standard.

They allowed no deduction on account of remuneration of Managers and Directors for the accounting period ending 31st May, 1916. They amended the assessment accordingly. On appeal, the King's Bench allowed the appeal as to the first point of dealing with £ 350 but disallowed the appeal on the second point.

2 T.C. 100 ref.

Pegg and Ellam Jones Ltd. v. The Commissioner Inland Revenue.

12 T.C. 82 (88,90,92.)

Excess Profits Duty—Advances made to secure raw material—Not a deductible allowance from profits.

Assessee company carried on the business of paper making at Sheffield, the chief raw material used being wood pulp. Prior to the war, raw material for paper manufacturing was got from Scandinavia but after the war, hostilities between Britain and Sweden led to the former getting her supply of wood pulp from Canada.

Pursuant to this, the assessee company entered into a contract with a Canadian company (called 'Ha') for the supply

of 30,000 tons of sulphate pulp to be delivered at 3,000 tons per annum from 1917 to 1927.

In accordance with the terms of the above contract, the company made an immediate advance of a sum of £30,000 to 'Ha' against future deliveries of pulp to enable 'Ha' to develop its business, the company undertaking to pay nett cash less £1 per ton in repayment of the afore-mentioned advance on delivery of the goods. Interest to the company was payable by 'Ha' at 6% per annum on the said advance.

The company had to make further advances to 'Ha' in the sum of £15,000 for which the company received preference shares in 'Ha'.

In the spring of 1916, the British Government placed restrictions on many imported goods, including wood pulp, with the result that 'Ha' was unable to ship or deliver any pulp whatever in 1917 or even later.

'Ha' did not pay the company any interest and disclaimed any liability in the circumstances with respect to the sum advanced by the company.

On assessment to Excess Profits Duty, the company claimed to deduct the sum of £30,000 advanced to 'Ha' as part of its annual expenditure incurred in the carrying on of company's business and as such deductible from its profits for purposes of assessment to Excess Profits Duty.

The Commissioners disallowed the company's contention and confirmed the assessment. The above finding was upheld by the King's Bench Division also (per *Rowlett J.*) and it was observed that the company ventured the sum in the nature of capital expenditure and not as a trade expenditure of the year at all.

5 T. C. 529 Disting.

5 T. C. 327 foll.

Charles Marsden & Sons Ltd. v. The Commissioner Inland Revenue.

12 T. C. 217 (220, 225 226).

Excess Profits Duty—Loss incurred by company in paying penalty under Customs Act and legal expenses— *Nota deductible amount from profits.*

Assessee company carried on the business of oil merchants at Hall and elsewhere.

They were sued for a penalty on an information exhibited by the Attorney-General under the provision of the Customs (Consolidation) Act, 1876, Section 139, as extended by the Customs (War Powers) Act, 1915, Section 5 (1) for an offence alleged against them in breach of certain orders and proclamations relating to the requirements of the Board of Customs and Excise with respect to a consignment of oil shipped by them to Norway.

The action was settled in Court by consent, the assessee agreeing to pay a mitigated penalty of £ 2,000, such sum to cover the costs of the Crown. All imputations as to the assessee's moral capability were to be withdrawn and it was to be made clear to the public that there was no intention from the beginning to the end of the transaction that the assessee had, by connivance or consent, been taking part in trading with the enemy but had only been capable of carelessness. The penalty of £2,000 was duly paid and the assessee incurred legal costs amounting to £ 560-18-10.

The above sum of £2,000 plus £560 and odd was not deducted from assessee company's profits in computing profits for Excess Profits Duty purposes. The company claimed to deduct this sum as an expense deductible from profits.

The Commissioners allowed the deduction claimed. On appeal, the King's Bench Division reversed the Commissioners' finding and disallowed the deduction claimed.

5. T. C. 215 (220) foll.

The Commissioner Inland Revenue. v. E. C. Warner & Co. Ltd.

12 T. C. 227 (230, 231, 232).

**Excess Profits Duty—Customs (War Powers) Act, 1915—
Penalty under and costs of proceedings—Not deduc-
tible allowance.**

Assessees were general produce merchants, carrying on business in the city of London. Their business was an old and established one, founded in or about 1885, by a Russian subject, who became naturalized British subject. A large part of the company's trade consisted of the export of goods to Russia and Scandinavia. After the passing of the Customs (War Powers) Act, 1915, the company adopted several precautions to avoid the infringement of the provisions of the Act. In spite of this, in 1916, informations were brought against the company for penalties under the said Act, by Attorney-General in respect of the infringements of the said Act in respect of their trade and upon proceedings in the High Court of Justice coming on for hearing before the Lord Chief Justice, the company paid a sum of £ 3,000 without costs on the condition that the record was withdrawn. The company also incurred legal costs in the proceedings to the extent of £ 1,074-12-7. The company, on assessment to Excess Profits Duty, contended that the said sums of £ 3,000 and '£ 1,074-12-7 were proper deductions in arriving at profits for purposes of Excess Profits Duty. The Commissioners held that the deductions are admissible. The above finding was reversed by the King's Bench Division (*Per Roulett J.*) and this finding of the King's Bench Division was also upheld by the Court of Appeal.

12 T. C. 227 foll.

5 T. C. 215 ref. (220)

The Commissioner Inland Revenue v. Alexander Von Green Co., Ltd.

12 T. C. 232 (233, 234, 238, 244)=(1920) 2 K. B. 553=89

L. J. K. B. 590=123 L. T. 838=36 T. L. R. 463.

Finance Act 1915, Section 40 (1) and (2), Schedule IV, Part 1, R. 1, 3 and 5—Part III, R. 1 (a)—Deductions from profits of trade—Compensation paid for unexpired contract—Manager's remuneration—Not allowable deductions—Change of ownership does not affect.

The business under the name and style of John Smith & Son had been carried on for many years. John Smith, the sole partner, died on 7th March, 1915. By a trust disposition and settlement, dated 17th October, 1908 and contract dated 7-1-1909, the said John Smith left the business after his death to his son, for a valuation to be ascertained from balance sheet at the time of his death, nothing being charged for goodwill.

A profit and loss account was prepared from 7th March 1915 to 31st December 1915, from which was deducted a sum of £ 80,000 as "sum paid to the trustees of the late John Smith, being agreed on value of current contract taken over by the new firm". The said coal contracts were entered into, by the late John Smith and several colliery owners and by the contract the latter agreed to deliver to the former certain quantities of coal at fixed prices. The said contracts had various terms of duration none extending beyond 31st December 1915. Assessors contended that they were entitled to deduct £3,000 in arriving at their profits and also claimed a deduction of £ 20,615-17-9 paid to the Manager of the business.

The Commissioners held that the sum of £ 30,000 was not deductible from the profits of the period from 7th March 1915 to 31st December, 1915 and that the questions as to the Manager's remuneration was not within the cognizance of the General Commissioners in Glasgow but was one entirely for the determination of the Commissioner Inland Revenue (London).

The finding was upheld by the Court of Sessions and the House of Lords. (*Viscount Finlay* dissenting) as to the question of unexecuted coal contract compensation amount of £ 30,000. On the point of the remuneration of the manager, the Court of Sessions upheld the Commissioner's finding, observing that this part of the appeal depended on the construction of Rule 5, Part 1, Schedule IV, and that the said rule entirely supported the Commissioners' view.

information first sought of them.

The Adam Steamship Co., Ltd., v Matheson (Surveyor) of Taxes.

12 T.C. 399 (410, 415, 416, 417). =58 Sc. L. R. 168= 1921 Sess. Cas 141.

Finance Act, 1915, Section 40, Schedule IV, Part I, R. 3 — Finance Act, 1916, Section 47 — Deduction from Profits of trade—Costs of repairs of ship.

In December, 1919 the assessee company bought a ship built in 1906 for £ 97,000 which at the time of purchase, was ready to sail with freight booked. The periodical survey of the ship was then considerably overdue, indeed, for the purposes of the voyage about to commence exemption from survey had had to be obtained. On return from voyage, the ship underwent survey and the purchaser had to spend £ 51,558 on repairs in addition to a further expenditure of an admittedly capital nature.

The pre-war profits were calculated with reference to the profits arising from the use of the ship by the purchasers' predecessors during the pre-war trade years.

Assessee company claimed a deduction of £ 51,558. The Commissioners on the evidence before them allowed a deduction £ 12,000, and amended the assessment accordingly. On a case being stated, the Court of Sessions upheld the above finding.

2. T.C. 435 appl.

The Law Shipping Co., Ltd., v The Commissioner Inland Revenue.

12 T.C. 621 (624, 627, 629). =1924 Sess. cas. 74.

Finance Act, 1915, Section 40 & Schedule IV, Part 1, R.1 — Deductions from Profits—Loss on forward contract not deductible.

Assessee company was a paper manufacturing company. It entered into three contracts (A.B.C.) for the purchase of raw materials (esparto grass, bleaching sulphite pulp and "Siwan" brand of bleaching sulphite pulp). The contracts were negotiated and made through the company's agents, Messrs. Andrews & Co., Ltd., London.

The accounting period of four months ending 30th April, 1921, was the last accounting period of the company, to which the assessment to Excess Profits Duty in question in this case related.

Before and in the course of the accounting period it became clear to the company that owing to the great depression in trade and fall in prices it had contracted for above the supplies of the esparto grass and sulphite at prices far in excess of the prices ruling or likely to rule during the periods fixed for delivery and in excess of its requirements owing to the said depression in trade.

In case A (esparto grass) the company did not arrange to take; nor did actually take any delivery of the grass during the accounting period. On about the 21st April, 1921, the company received upon its own request a *pro forma* invoice for the whole of the grass at full contract price. The document, issued by the agents, stated that "this grass is being held in stock for your account". In case of contract B, 300 tons of sulphite had actually been delivered before the end of the accounting period, 650 tons remaining undelivered. In case C, no goods were to be delivered or contracted to be delivered before the end of the accounting period.

In both the cases "*pro forma* invoices" were received at company's request, dated 30th April, 1921, and marked and *pro forma*.

In both cases, a certificate was produced to the effect that the goods contracted for had been set aside in warehouses, prior to 1st April, 1921.

On assessment to Excess Profits Duty, the company contended that the 2000 tons of esparto grass and 1150 of sulphite must be treated as stock of goods belonging to the company on the 30th April, 1921 and that, alternatively, the company was entitled to charge a loss the estimated loss on contracts.

The Revenue, while admitting that in commercial practice it was right for the company to make a reserve against contingent loss on the contracts, claimed that no allowance, therefore, could be made in calculating the profits of the accounting period.

The Commissioner held that:

- (1) that the assessees were not entitled to treat any part of undelivered goods under the three contracts as stock in hand at the end of the final accounting period;
- and (2) the loss could not in terms of the Act, be treated as a loss which has already been incurred when, in fact, it is still to come.

The assessment to Excess Profits Duty was, therefore, confirmed. On a case being stated, the Court of Session, as a Court of Exchequer in Scotland upheld the Commissioners' finding.

6 T.C. 59 Expl.

Edward Collins & Sons Ltd. v. The Commissioner Inland Revenue.

12 T. C. 773 (774, 783, 784)=1925 Sess Cas Sc 151=125 S. L. T. 5.

Finance Act, 1915, Section 40 (1)—Deduction from profits of trade for Excess Profits Duty purposes—Pensions and compensations for loss of office paid to employees, not admissible deductions.

Assessee company carried on general business of brewers. In October, 1920, the Directors of the company decided to close down its business. The company decided to grant various sums to the staff and workmen as compensation for loss of office and the instance of some employees of long service pensions were granted.

The company ceased trading on 30th June, 1921, and by a special resolution passed on 17th February 1922 and confirmed on 10th March, 1922, it was resolved that the company be wound up voluntarily and a liquidator was appointed on 10th March, 1922.

The amount of compensation proposed to be awarded to the employees came to £14,041 and that of pensions to £4,288. This sum was debited in the profit and loss account of the company for the year ending 31st March, 1921, though not paid within that year. The company claimed to deduct the said

sum from their profits for Excess Profits Duty purposes. The Commissioners held that the amount was deductible from assessable profits of the company, as money exclusively laid out for purposes of trade. *Held*, on appeal by the King's Bench (*per Rowlett J.*) that the deductions could not be allowed, as the sum paid were not money expended for the benefit of trade or business but were *ex gratia* payments, as the result of the company dealing generally with their employees and not as a result of any contract with them.

The Commissioner Inland Revenue. v. The Anglo Brewery Co. Ltd.

12 T. C. 803, (803,812,813.)

Finance Act, 1915, Section 40 (1) and Schedule 1V, Part 1, Rule 1—Deductions, from profits of trade—Anticipated loss on ship-hiring not deductible.

Assessees carried on, in Glasgow, the business of ship owners and ship managers. It was part of their business to hire ships on time charter. In such a business, profits are made if the freights received exceed the amount of hire of the vessel chartered and the expenses of running her and losses if reverse is the case.

Assessees balanced their account books on 31st December, each year. During the earlier part of 1920, shipping business was good but in the latter part of the year, it experienced a severe depression which extended over 1921. On 31st December, 1920, when the appellants had a number of vessels on time charter, the assessees were practically certain that in 1921, rates of hire for vessels on time charter, the quantity of cargo and the freights for carriage of goods by sea would fall very seriously. In framing their balance on 31st December, 1920, therefore, they estimated the loss that they had to face in the circumstances above stated by debiting the whole of the hire of the vessels chartered by them to become payable by them after the 31st December 1920 and *per contra* arrived at the freight they would receive by taking the hires current for vessels on time charter on 31st December, 1920.

By the above process, the assessee company arrived at a loss greater by £6,063 than the amount allowed by the Inland Revenue Commissioner as the deficiency to be taken into account 1920, in fixing their liability to Excess Profits Duty.

On the balance sheet account prepared, according to which the above figure was shown, the company's senior partner retired from 31st December, 1920 and was settled with his partners and paid out his interest in the firm, with reference to the said balance sheet.

The company contended that the method of calculating the anticipated loss, as adopted by them, was right and proper in the circumstances stated above.

The Commissioners, however, did not allow their contention.

On a case being stated the Court of Sessions unanimously upheld the Commissioners finding, observing that, as the company sought to exclude future, anticipated losses from the account of their profits of trade for the accounting period, their contention could not be allowed.

12 T. C. 773, ref.

Whimster & Co. v. The Commissioner Inland Revenue.

12 T. C. 813 (819,824,828,826,827).=(1926) Sess Cas 30
=(1925) Sc. L. T. 623.

Finance Act, 1915, Section 40 (1) and Schedule IV, Part 1, R. 1 and 5, deduction from profits of trade or business—Anticipated losses on forward contracts not deductible.

Assessee company carried on partnership business as muslin manufacturers. On various dates between December 1919 and April, 1920, assessee entered into forward contracts for the supply of yarn. Deliveries under these contracts were to be made, "as required." In the usual course of the particular trade deliveries under contracts of this kind began to be made one month after the date of the contract and the completion

was effected annually within six months, though extended at times to beyond one year. In March, 1921, when the deliveries under the above contracts were not complete, assessees anticipated, owing to a depression in trade and fall in prices they were under a liability, by reason of the contracts to pay a sum of £ 6000 [for the undelivered yarn in excess of the prices at which yarn was available then.

Assessees accordingly, entered into negotiation with the contracts not to obtain any reduction in prices but to settle a lump sum as the difference between the market prices on 16th March 1931 and the contract prices and to treat this as a debt due by the assessee company. This was agreed to and the amount fixed at £6,287 and an invoice passed for the amount.

The senior member of assessees' firm died in October 1920 and in a settlement of account between his representatives and the surviving partners, the above sum of £6,287 and odd was treated as a loss.

The assessee company claimed to deduct the above sum from their profits for Excess Profits Duty assessment purposes, as being an ascertained liability of theirs.

The Revenue contended that the sum was not deductible, not being trading expenses, of the assessees, for the accounting period in question.

The Commissioners disallowed the deduction, holding that the sum of £ 6,287 and odd was a reserve in their accounts to meet contingencies which had not in fact arisen during the accounting period to 25th March, 1921.

12 T. C. 382 foll.

On a case being stated, the Court of Sessions upheld the above finding of the Commissioners.

J. H. Young Co. v. The Commissioners Inland Revenue.

12 T. C. 327 (834, 839, 840). = (1925) 8c L. T. 628 = (1926)

Scas Cas 80.

Finance Act, 1915, Section 40 (1) Schedule IV, Part I, R. 1 & 3—Deductions from profits of trade—Demurrage subsequently abandoned not an allowable deduction.

Assessee company carried on the business of grain merchants. During the period from 1st October, 1919 to 3rd September, 1920, being the accounting period in question, the company bought grain in Argentine and sold it to the Royal Commission upon Wheat Supplies. The terms of agreement between the Commissioners and sellers were embodied in an agreement technically known as "Centrocon Charter". A clause in the said agreement related to the payment of demurrage by the sellers.

The grain to be sold to the Commissioners by the assesseees was purchased by the latter in all parts of Argentine. In February, 1920 there was a stevedore strike at Rosario and elsewhere in Argentine, and it lasted till April, 1920. As a result, transit facilities having been disturbed, contracts for delivery of wheat could not be carried out, whereupon the wheat Commissioners claimed demurrage, which in the case of assesseees, involving 11 ships, totalled £ 33,847. Assesseees protested the claim immediately after it was made that no time admitted it.

The Commissioners demanded immediate payment and in June, 1920, they began to deduct the amount of the claim from the various invoices presented to them by the assesseees for grain loaded.

In view of the difficulties due to strike and the uncertainties of the position generally, the Commissioners were persuaded to discontinue the practice and to leave all claims to be dealt with when the relevant facts could be fully ascertained. A deduction which had been made in the case of one steamship was refunded to the sellers by the Commissioner.

The amount of £ 33,847 was, however, put in by the assessee company in their balance sheet as their ascertained liability on 30th September, 1920, being treated as an expense in the trading account for that year.

Following the stevedore strike, above-mentioned, the ship-owners claimed demurrage from the Commissioner, which, in order to resist the claims, negotiated with the suppliers (assessee included) to procure and give exact evidence as to the supplies of wheat being available for shipment at the time of the above strike. In consideration of this, the claim against the suppliers by the Commissioner for demurrage was abandoned and in consequence, the assessee company did not have to pay £ 33,847 above-mentioned or any sum as demurrage to the Commissioner. The assessee company, however, on assessment to Excess Profits Duty claimed to deduct this sum from their profits as they contended, that their liability to pay demurrage remained, which they discharged by rendering services to the Commissioners in the shape of evidence.

The Commissioners disallowed the claim to deduction, as the company never admitted the Commissioners' claim to demurrage and that what the Commissioner gave up for services rendered was indeed not the above sum lent on an ascertained future liability for further claim and that the liability was mere contingent.

The finding was upheld by the King's Bench Division (per *Rowlett J.*)

12 T. C. 768 & 12 T. C. 927 ref.

H. Ford & Co., Ltd. v. The Commissioner Inland Revenue.

12 T. C. 997 (1001, 1002, 1006).

Finance Act, 1915, S. 40 (1)—Schedule IV, Part 1, Excess profits Duty.—Deductions from—Damage to coal mines—Cost of repairing—Repair after close of accounting period—Not a deduction allowable in respect of accounting period.

Assessee companies carried on business as colliery proprietors.

From April, 1921 to July 1921, there was what was known as the "National Stoppage in the Coal Mining Industry" and consequently there was a complete stoppage of work in companies coal mines, as also in every other coal mine in Great Britain.

As a direct result of the said stoppage of work, the companies coal mines suffered serious damage and a large amount of repairing work had to be undertaken to recondition the said mines. This work, started immediately at the end of the national stoppage on 2nd July 1921, was fully completed within about six weeks.

The total cost of the said work, in the case of one company was £ 38,930 and that in the case of the other £ 33,072.

In both cases, the companies claimed to deduct the sum of £ 37,808 and 33,072 as a deduction properly and reasonably attributable to the accounting period ending 30th June 1921 within reference to Section 40 (1) Finance Act, 1915 as amended by the First Part to Schedule IV of the Act.

The Commissioners found that the sums were not deductible as claimed.

The finding was upheld by the King's Bench Division (*Rowlett J.*) observing that it was not an expense of the accounting period but of running the mine after the accounting period, although it was due to an accident that happened during the accounting period.

The Court of Appeal and the House of Lords also upheld the above finding.

(*Sergeant L. J. dissenting*) 1 T.C. 297 (312) and 2 T.C. 321 (327) *ref.*

(1) *The Naval Colliery Co. Ltd. v. The Commissioner Inland Revenue.* and (2) *The Glamorgan Coal Co., Ltd. v. The Commissioner Inland Revenue.*

12 T.C. 1017 (1020, 1025, 1029, 1036, 1041, 1045, 1052, 1053) = 136 L. T. 28 = 138 L. T. 593.

Excess Profits Duty—Assessability to—Deductions of profits—Hire of ship paid to owners deductible—Profits of coal transactions assessable to Excess Profits Duty.

Assessee company carried on the business of ship owners, merchants, ship-brokers etc. In 1910, and 1911 the company chartered two ships. The terms were that the owners were not to bear any part of any losses during the currency of the hiring

and were to receive from the company for hire a sum for depreciation calculated with reference to the cost of the vessels to the owners and a sum as net profits deducting depreciation.

The company wanted to include the above sums in the computation of pre-war standard profits for Excess Profits Duty purposes, as payments made out of profits. The company had entered into contracts for delivery of coal with a company to deliver the same upto a fixed maximum and at a fixed price per ton. In January 1916, some of the company's ship were requisitioned by the Australian Government and the company, having a surplus of coal to be delivered under contract, transferred the benefit of the contract, upto 15,000 tons. The company was to receive 6 s. per ton as a consideration. Under another similar transfer of contract of coal, the company was to receive 10s. per ton with regard to 8,000 tons.

The company did not sell coal as a matter of practice. The company contended that the premium amounts received under the transfers were not part of their profits for Excess Profits Duty purposes, being profits not of sale of coal but of transfers of contracts, which were capital assets, or at least, that they were casual profits only.

The special Commissioners on appeal, decided as to depreciation and share of profits payable to owners of two chartered ships that in respect of the depreciation depending on the earning of the profits and also in respect of the shares of profits payable to the owners of the ship after the said profits had been ascertained the company's contention did not succeed but that in respect of the depreciation payable to the owner of the ships in any event, without consideration to the earning of profits by the ships, the crown should succeed.

As regards the premium received from the sale of the coal contracts, the company's contention was disallowed.

On appeal, both by the company and Commissioner Inland Revenue, the King's Bench Division decided on both the points

in favour of the Crown.

12 T. C. 297 ref.

George Thompson & Co. Ltd. v. The Commissioner Inland Revenue and The Commissioner Inland Revenue. v. George Thompson & Co., Ltd.

12. T. C. 1091 (1097, 98, 1099, 1002).

Finance Act, 1915, Section 38(3) Finance Act, 1921 Section 38, Part 1 Schedule 11, Sale of business person entitled to deduction and relief.

A company (the Old Company) incorporated in 1903, carried on business as merchants at Manchester. An agreement to sell the business of the company was entered into on 25th October, 1920 according to which, the purchasers agreed to buy the undertaking and assets of the Old Company, subject to its liabilities and obligations at a price equal to £ 5 per £ 1 fully paid up shares (issued ordinary) and £ 1 per £ 1 issued preference shares of the company. The deposit paid at the time was £ 22,200 the purchase was to be completed within six weeks.

On the 15th December, 1920 the New Company was incorporated under the Companies Act 1908 to 1917. The Old Company was wound up by a special resolution passed on 31st December 1920 and confirmed 17th January, 1921 and a liquidator was appointed.

By a sale deed dated 25th July 1921, the premises of the Old Company were conveyed to the New Company by the liquidator, for a consideration paid in cash. The Old Company paid Excess Profits Duty in respect of the profits of the said business for the accounting period upto and including the the accounting period ending 31st December, 1919, a further sum of £16,834-12-0, being due by them for the said period.

For the accounting period ending 31st December, 1920 a loss in trade was sustained producing a deficiency for Excess Profits Duty purposes amounting to £43,914.

The New Company claimed that the amount of deficiency in respect of which the Old Company was entitled to a repayment of or a set off against the Excess Profits Duty under Section 38 (8) was the above sum of £43,914.

The new company, further claimed relief under Section 38, Finance Act, 1921, and Part I, Schedule II to the extent of £23289, being the amount by which the value of the whole of the trading stock in hand at the end of the final accounting period i.e. 31st December 1920 exceeded the value of an equal quality of similar stock as on the date when the said business changed ownership (R. 1 & 7 Part Schedule II, Act, 1921.)

The Commissioner Inland Revenue determined that the amount of the said deficiency was the sum of £35,875 the proportion of the sum of £43,914 from 1st July 1920 to 25th October 1920 on the ground that the old company ceased business on 25th October, 1920 and that any loss sustained after that date was not a loss sustained by the old company. The Commissioner Inland Revenue declined relief under Section 38, Finance Act, 1921 on the ground that the old company were not owners of the business at the end of the final accounting period.

The assessee company contended that the old company owned the said business at the end of the final accounting period, i.e., 31st 1920, that the old company held the business till the date of sale of premises on 25th July 1921, that the old company was entitled to relief under Section 38, Finance Act, 1921. The Commissioner held that the old company ceased to hold the business on 25th October, 1921, that the determination of the Commissioners as to the amount of the deficiency amounting to £35,875 was correct and that the company was not entitled to relief under Section 38 Finance Act, 1921.

The finding was upheld by the King's Bench Division.

Fred W. Millington Ltd. v. The Commissioner Inland Revenue.

12 T. C. 1031 (1088, 1091)

Excess Profits Duty—deductions from profits of trade—bonus to employees in the shape of share of company yet to be formed.—Not deductible from profits.

Assessee, a naturalized subject of great Britain, carried on business in partnership for many years before the outbreak of the war of 1914.

Under an agreement dated 27th January, 1915, however, he became the sole proprietor of the business, including the goodwill and assets etc. Thereafter the assessee carried on the business in his own name. On the outbreak of war, his employees (one-third) were absent on war service. Assessee had thus largely to depend upon the assistance of his principal employees remaining in his service and it became essential for him to retain their services.

Thus, the conditions under which business was carried on involved greater responsibility and additional labour on the part of the employees. In 1915 and 1916, the assessee promised that when he turned the business into a limited company (as he intended to do at the end of the war) he would recognize their assistance by giving them, in return for extra service required of them, a bonus in the shape of a proportion of share in the limited company when formed. No definite number of shares was promised and there was no written contract but he intended to distribute approximately ten percent of share capital.

A private company was limited in 1921 and bonus in the shape of shares, as promised were awarded by the assessee to the value of £11,200. The company claimed deduction of this sum from profits assessable to Excess Profits Duty.

The Commissioner on appeal allowed the sum as deduction. On a case being stated, the Court of Sessions revised the Commissioners' finding and held the sum as not deductible.

The Commissioner Inland Revenue v. Bell.

12 T. C. 1181 (1186 1190).

Excess Profits Duty—Deductions from Profits of trade—Biscuit manufacturing company—Loss on tins and tinplates.—Capital loss not deductible for Excess Profits Duty purposes.

The assessee, Messrs. Huntley & Palmers Ltd., were the well known manufacturers of biscuit at Reading. Their tin boxes were supplied by an allied or sub-ordinary company Messrs. Huntley Bourne & Stevens, Ltd.

In the early part of the year, 1920, this company, which was a company of comparatively small resources entirely

controlled and owned by Messrs. Huntley and Palmers, ordered a great quantity of tin plates with a view to making tin boxes to meet the very large demand for Messrs. Huntley and Palmer's biscuit.

The great depression set in 1920 and was established by March, 1921, when the assets came to be made up and the demand for biscuits, therefore, for time had dropped away almost to nothing. The company (Steven Ltd.) was faced with difficulty whereupon, on their approaching Huntley Palmers & Co., the latter took over unfinished tin plates and even these lying at the manufacturers. Huntley Palmers entered the cost of taking one of these tin plates as their expenses. They were entered in the stock at half that figure. The resulting loss the assessee, Messrs. Huntley & Co. wanted to bring into accounts.

They contended that the transaction of taking over tins, unfinished and even undelivered, from Stevens Ltd. and making entries in respect of these, as they were done by the assessee, as to their value and the consequent loss was all done in the course of their trade or business and that they were entitled to claim deduction in respect of the loss on this account. The Commissioner accepted the assessee company's contention and allowed the deduction claimed. On appeal, the King's Bench Division held that the money thus used (said to be loss by the assessee company to help the Stevens Co. in order to ensure their supply of tin) was used by them in another business and that as such it was a capital risk and not an allowable deduction from their profits, assessable to Excess Profits Duty.

5 T. C. 327 ref. & 12 T. C. 217

The Commissioner Inland Revenue v. Huntley & Palmer Ltd.

12 T. C. 1209 (1219, 1222).

Finance Act, 1915, Section 38 (3) Excess Profits Duty—Deduction of loss out of profits assessable—Date of accrual.

Assessee company carried on business as potato merchants in Belfast.

For the accounting period ending 30th June 1921, being the last accounting period of the assessee company, the Commissioner Inland Revenue determined the deficiency for Excess Profits Duty and the assessee at £6,081. Under a contract between the assessee company and Messrs. J. W. & D. Martin, the assessee company agreed to purchase 250,000 bags to be delivered from September, 1920 to February, 1921, in six equal monthly deliveries. Assessee later took delivery of 35,300 bags only as a part of contract and refused to take delivery of the balance of 214,700 bags. The market price fell in March, 1921, to approximately 3d. per bag.

Upon an action being taken by Messrs. Martin against the assessee company, for damages for breach of contract, on 28th April, 1921, a settlement was arrived at on 5th August 1921 according to which the assessee company agreed to take delivery of the bags undelivered at a reduced price. These were delivered to the assessee company on the 30th June, 1921 and the latter paid for them on the agreed terms.

In their balance sheet, as of 30th June, 1921, the company showed a loss of £5,814-15-10 but it was in evidence that the actual net loss incurred was £4,733-5-2. The assessee company contended that the said loss represented damages for breach of contract and accrued as at 24th March, 1921, the date of the said breach and that it should be taken into account for the accounting period ending 30th June, 1921. The Recorders of Belfast allowed the contention. On a case being stated the two Judges of the King's Bench Division differed with the result that, according to the practice then prevailing, the junior Judge dissenting, was not allowed to withdraw his judgment.

The position, in consequence was that the Recorder's finding stood, and costs were allowed to the assessee company. On appeal to the Court of Appeal, the case was eventually compromised.

In this case a preliminary point was also raised that the King's Bench Division had no jurisdiction to hear the case, which was not stated within time (seven days) as required by Section 149 (1) (d) Income Tax Act, 1918. The contention was allowed and the case was dismissed with costs.

On appeal, however, facts transpired according to which the statement of case, was, in the special circumstances, held to have been lodged in time.

The case after being stated was handed over by the Recorder to an official for attaching the necessary documents to it. The said official handed it over to the H. M. Inspector of Taxes for the purposes. Considered from the date that it was filed on completion by the said Inspector it was within time and it was accordingly so held by the Full Court. It was, however, observed (*per Andrews, L. J.*)

We feel it our duty at the same time to add our expression of regret that the case stated was permitted to be handed over to Mr. Roy, who was really one of the litigants, before completion, for the purpose of having it completed by such party. As was stated by *Holmes, L. J. in Whelan v. Fisher*. 26 L.R.J. 340 at page 356, it is clear that the duty and responsibility of stating the case rests with the Court, which in that case was the Justices. We fully recognise that in the performance of this duty in so far as it is of a purely ministerial character the Court may reasonably call to its aid the services of its duly recognised official, but the ultimate responsibility for the due and proper performance of such duty still rests with the tribunal. The Court cannot lawfully delegate to another the duty imposed upon it by Statute. These observations apply with special force to any attempt to delegate such duty to either of the parties or their advisers. Such an attempt is unauthorised by Statute, is fraught with grave danger, and is calculated both to mislead the other party and to create a situation such as that which has unfortunately arisen and had led to the incurring of very considerable unnecessary costs in the present case.

The Commissioner Inland Revenue. v. Hugh T. Barrie Ltd.

12 T. C. 1228 (1127, 1328, 1230, 1231, 1240)-(1928) K. B. (N. I.) 129

S. 38(3) (Finance Act, 1915)—price paid by members of a mutual trading association for quantity of goods purchased for the association—Deductibility.

Assessee in this case were members of a trade association

called the Gold Rolled Brass & Copper Association, which was an unincorporated body governed by rules and was for the advancement of the interests of its members who were engaged in business in this class of materials. Under one of the rules, governing the association, it was provided that there should be a common fund, that members should pay an entrance fee to it and also s. 10 per ton or such other sum per ton as might be fixed on the member's monthly output until the fund should be thought large enough. The amount paid by each member was to remain the property of the association until winding up order. On winding up, by a rule, the sum standing to the credit of the members was to be divided among them. After the war, the Ministry of Munitions had copper & brass materials to dispose of and they sold them to this Association.

The Association was expressly authorized to enter into this contract by members because it was not part of their ordinary business. The members were asked by a circular letter to purchase the stuff.

The question was whether the difference between the price paid by the Association to the Government and that paid by the members to the Association was deductible out of profits assessable to Excess Profits Duty.

The Commissioners have held that this was not deductible, because, they said, the assessee must be regarded as parties to the transaction with the Government.

On appeal, the King's Bench Division (per *Rowlatt J.*) gave judgment in favour of the assessees holding that the sum in question was deductible from the profits of the assessees for the purposes of Excess Profits Duty computation.

Charles Clifford & Son Ltd. v. Commissioner Inland Revenue 14 T.C. 199 (203)

Finance Act, 1915 Section, 35 (1) & Schedule IV, Part 1, R. 6 Excess Profits Duty—Deduction of for income tax purposes—Scope of Section 35.

Assessee company was an incorporated company, limited by shares. Until the 31st March, 1918, the whole of share capital of the company was owned by a company called Richard

Dickeson & Co., Ltd. which carried on the same trade or business. The assessee company was accordingly for the purpose of Excess Profits Duty treated as a subsidiary of Richard Dickeson & Co., Ltd., and the profits of the two companies were not separately assessed to Excess Profits Duty pursuant to the provisions of R. 6, Part I Schedule IV, Finance Act, 1915.

The Excess Profits Duty payable in respect of the year 1915, 1916, 1917 and 1918 (upto 31st March only in the case of 1918) upon the profits of the two companies was paid by Richard Dickeson & Co., Ltd.

On the 31st March, 1918, Richard Dickeson & Co. Ltd. ceased to trade and on the 30th May 1918 went into voluntary liquidation. The Excess Profits Duty paid by Richard Dickeson & Co. Ltd. was allowed as a deduction, under Section 35(1) Finance Act, 1915, for income tax assessment purposes.

In the above circumstances, the company claimed that under terms of Section 35(1) the company was entitled in the computation of Income Tax assessment to a deduction in respect of the Excess Profits Duty so paid by Richard Dickeson & Co., Ltd., so far as that company by reason of having ceased to trade had not recovered the full benefit of the deduction allowed by Section 35(1). They accordingly claimed deduction of the four items of Excess Profits Duty, in respect of the years 1915, 1916, 1917, and 1918 and that the said sums, though assessed on and paid by Richard Dickeson & Co., Ltd. were, by Section 38(1) Finance Act, 1915, charged on the profits of the trade or business of the company.

The Crown contended that the company were not entitled to deduction which they claimed under Section 35(1).

The Commissioners found that Excess Profits Duty attributable to the business of the company had been paid and held that under Section 35(1), Finance Act, 1915, the amount so paid should be allowed to the company as deduction in computing their profits and gains for purposes of income tax.

On appeal, the King's Bench Division, held (per *Rowlett J.*) that the deduction claimed could not be allowed. The finding of

the King's Bench Division was upheld by the Court of Appeal also. It was observed.

(Per Lord Hanworth M.R.)... —...looking at the whole section it appears to me that the Excess Profits Duty which can be deducted from the income tax is identified with the person who has made that payment of Excess Profits Duty. Looking at Rule 4 and which appears in it, the same view, I think, arises..." Per Lawrence L.J.) In my judgment, that claim cannot succeed. Section 85 of the Act, allows a person who has paid the Excess Profits Duty to bring that payment into his account for income tax purposes as an expense; it seems to me, however, that it is impossible successfully to contend that Reynolds ought to be allowed to bring in as a deduction from their own income any thing in respect of the sums which were paid not by them but by Dickeson. Reynolds did not make the payments, nor did they bear the burden of them; they were not liable for them; and they, in fact, never became chargeable in respect of them. Section 85 is, I think, confined exclusively to payments made by the person who is claiming to have them allowed as a deduction.

Ogston v. Reynolds, Sons & Co. Ltd.

15 T.C. 501 (505,512,513,515)

Excess Profits Duty—Computation of—Deduction of value of goods destroyed by accident—Loss made good in subsequent year—Period of accounting.

Assessee company was an incorporated company, carrying on the business of whole-sale and export iron-mongers, iron-finders and hardware merchants. Certain goods of the company was lost by fire or sea water, in 1918. The company received three sums from under-writers, on account of the above mentioned loss in 1919. The company contended that this sum formed part of their trade receipt for 1919 when the sums were received and not for 1918, when the losses were made.

The company had dealings with the Ministry of Munition and the Disposal and Liquidation Commission. The company made up a separate account of its transaction with the Minister of Munition and the Disposal Commission upto 31st December, 1920, showing the result of these transaction according to which

there was a loss amounting to £59,649. The alleged loss did not in the end fall to be borne by the company, because, under the later agreement, not only was the company entitled to set all its expenses against the resale price in accounting to the Minister of Munitions or the Disposal Commission but, under the provisions of agreement, it received in 1923, in addition two sums of £36,472 and £10,000 from the Disposal Commission. The company contended (1) that the three sums received by the company from the under-writers formed part of the company's trade receipts for the year 1919 when the sums were so received and for the year 1918, when the losses were made; (2) that in the year ended 31st December, 1920 the company made a trading loss of £ 59,649 in its dealings with the Minister of Munitions and that the two sums received in 1923 were incapable of being divided or allocated to any particular period and that, therefore, no part of these two sums was attributable to the year ended 31st December, 1920. The Commissioners held that the three sums received from the under-writers were property to be taken into account as trade receipt of the company for the year 1918, when the losses were incurred and not for the year 1919, when the payments were received, that the company did not in fact make a loss of £ 59,649 or any loss on its transactions with the Minister of Munitions, and that a proportional part of the two received by the company from the Ministry related to the transactions of the year 1920. The Commissioner fixed the proportionate part of these two sums to be £ 7,275 and £ 3,272 respectively. On appeal, the High Court (King's Bench Division) decided the first two points in favour of the Crown agreeing with the Commissioners, but decided in the third point against the Crown.

Rownson, Drew & Cydesdale Ltd. v. The Commissioner Inland Revenue.

16 T.C. 595 (601,605)

Excess Profits Duty—Computation of—Deduction of Accounting fee for revision—Not an expense allowable in respect of the years revised.

Assessee was a brewery company, which was assessed to Excess Profits Duty in respect of its profits for the years, 1914,

1915, 1916, 1917, 1918, 1919 & 1920. For each of these accounting periods assessee, in the ordinary course, instructed the firm of accountants usually employed by them, to audit their accounts and to settle the amount of Excess Profits Duty or the deficiencies for the purposes of the said duty. The fee paid for this work was allowed as a deduction for purposes of assessment to Excess Profits Duty. As the computations made by the said accountants were erroneous, assessee instructed another firm of accountants to revise the computations made for the above accounting periods. As a result of the revision a sum of £ 6,491-6-0 was repaid to the assessee by the Commissioner Inland Revenue in August, 1928 and February, 1930. Assessee claim to deduct the revising fee paid by them to the accountants for obtaining the above said repayment, as an allowable expense.

The Commissioners did not allow the above accountancy fee as an expense of Excess Profits Duty and dismissed the appeal.

On appeal, the King's Bench Division upheld the above finding which was upheld by the Court of Appeal also.

12 T.C. 927, 12 T.C. 768, 12 T.C. 997, & 12 T.C. 1053
Distt.

Worsley Brewery Co. Ltd. v. The Commissioner Inland Revenue.

17 T.C. 849 (351, 353, 358, 359, 360, 61).

DEFICIENCY

Excess Profits Duty—Repayment of, due to deficiency—Valuation of stock in trade for the purpose—method of valuation.

Assessee in this case were textile merchants. They were not manufacturers but bought pieces of woollen goods from weavers, 'in the grey', which were got dyed by dyeing firms and were then sold.

Frequently pieces of cloth got from weavers are imperfect in condition and these imperfections are discovered by a process called 'perching'. According to the custom of the trade, a price is not imperfect if it has defects up to a certain number in

each piece, but it is imperfect if it has defects above that particular number.

Defect could be discovered easier after dyeing and so defects could not be discovered till late after delivery of pieces, as they were kept 'in the grey' and were not dyed till as late after delivery as upto 12 months. The arrangements between the assessee firm and the weavers in case of imperfect pieces varied.

(1) In case of goods purchased from a firm of weavers, Peel Bros. & Co., Ltd., it was agreed that Peel Brothers would take back the defective goods on discovery of defect and that the firm, on return of the defective goods was to take from goods of a perfect quality at the original contract price.

(2) In the case of goods purchased from another firm of weavers, T. & H. Harper Ltd., defective pieces were to be changed or sold and any loss in price was to be debited to them. In other cases though there was no definite agreement existed, the practice was the same as in the case of T. & H. Harper Ltd.

No definite contract existed in case of faulty dyeing, but really the difference in price due to faulty dyeing was debited to the dyer.

The firm's final accounting period for Excess Profits Duty was 31st March, 1921.

In making up the accounts upto the above date, no account was taken by the firm in respect of any sums which the firm might be entitled to charge against the weavers or dyers on account of defective weaving or dyeing then discovered.

The firm valued their stock on 31st March, 1921 for the purpose of making up their accounts to that date. Their method of stock taking was as under :

- (a) Perfect cloth (*i.e.*, pieces which had been examined and found perfect' was valued at market value (at 31st March, 1921, market value was lower than cost price).
- (b) All undyed cloth with the exception of the 268 pieces mentioned in paragraph 15 hereof was valued as perfect cloth.

- (c) Cloth which had been dyed and in which weaving defects had been discovered which entitled the firm to charge the weavers with the original cost price *plus* the cost of dyeing was valued at a price less than market value of perfect cloth. The price adopted was the estimated selling value of the cloth with its defects.
- (d) Cloth which was defective owing to faulty dyeing was valued at a price less than market value of perfect cloth. The price adopted was the estimate selling value of the cloth with its defects.

In making up their accounts up to 31st March, 1921 no account was taken by the assessee firm of the sums which the firm might be entitled to charge against the weavers or dyers on account of defective weaving or dyeing which had been discovered. The defective pieces of cloth out of those purchased from Peel Brothers, numbering 24, were discovered by the firm after 31st March, 1921. These were replaced by perfect pieces at original contract price, the dyeing cost being paid by Peel Bros., Ltd. From T. & H. Harper Ltd., 309 pieces were defective, and they were debited with contract price and cost of dyeing as regards 41 of these before 31st March, 1921 and as regards 268 after the above date (as these defects were discovered later, not having been examined at 31st March 1921). The assessee contended that their method of stock valuation was correct. The Commissioner found that that method was incorrect, that the deduction of one-third of two-thirds so far as perfect stock was concerned was a provision for a future unascertained loss, and so far as imperfect stock was concerned was a provision for a loss which would not be incurred and therefore a value arrived at on the firm's method was not in either case the market value.

On the further facts set out in paragraph 15 hereof with reference to the 268 imperfect pieces of cloth received from T. & H. Harper, Ltd., the defects in these pieces were discovered by the firm before 31st March, 1921 and treated as so discovered and the said pieces fell to be dealt with in accordance with paragraph 4 of our decision as set out in paragraph 22 hereof.

DIGEST OF E. P. D. CASES.

In all cases where defects in the goods had not been discovered before 31st March, 1921, we hold that the appellants are entitled to value the said goods at 31st March 1921, at the current market value of perfect goods of the same description, (market value being lower than cost price.)

The Commissioner, on getting further facts, held :—

Stock Valuation at 31st March, 1921. We hold that the correct method of stock valuation at 31st March, 1921 is cost price or market value whichever is the lower. By market value we mean the price at which Brigg Neumann & Co., could purchase the goods in the market. If in fact there is no spot market for goods of the same description as the goods dealt with by Brigg Neumann & Co., enabling market value at 31st March, 1921, to be readily ascertained, then market value at 31st March 1921, will be the price which ruled at the time when contracts for delivery at 31st March, 1921, were entered into.

In our opinion there is no justification in law for the deduction of one third of two thirds as representing the anticipated fall in wages.

The 268 pieces under Harper's Contract. Upon the evidence called before us we are unable to hold that the defect in the 268 pieces were discovered before 31st March, 1921. These pieces, therefore, fell to be dealt with under paragraph 3 of our first *interim* decision.

As regards the treatment under paragraph 4 of our first *interim* decision of goods which have been kept by Brigg Neumann and not returned to the manufacturer we adhere to the second paragraph of paragraph 4 that appellants must bring in as receipts the difference between cost price of the goods *plus* cost of dyeing and the value at which the said goods were brought into stock at 31st March, 1921.

The King's Bench Division upheld the above finding.

Brigg Neumann & Co. v. The Commissioner Inland Revenue and The Commissioner Inland Revenue v. Brigg Neumann & Co.

12 T. O. 1191 (1200, 1207).

Finance Act, 1922 Section 36—Section 38(3)—Finance Act, 1915—Voluntary in Section 36, meaning of—Repayment claimed by son ground of deficiency not allowed.

Claimants, in this case, claimed, under Section 38 (3) Act, 1915 and Section 36 Act, 1920 repayment of a certain sum of Excess Profits Duty on account of deficiency arising in the accounting period to 31st December, 1919 and 31st December, 1920.

The claimants carried on business as dry-setters in Glasgow. By a contract dated 18th March, 1919, R. A. Bird and his son W. T. Bird and one J. M. entered into partnership as dry-setters.

The period of contract of partnership was extended to five years from 1st January, 1914.

Mr. R. A. Bird died on 10th September, 1917 and Mr. J. M. on 27th September, 1921. Under the contract, as extended, J. C. Bird, R. A. Bird's son, took over his father's share of the business after the latter's death and carried on the same under the style of R. A. Bird and Co. Repayments had been made to R. A. Bird & Co. of a certain sum in respect of deficiencies arising for the years ended 31st December, 1918 and 1919. The said sum represented the share of total Excess Profits Duty previously paid by the firm R. A. Bird & Co. calculated as attributable to the two partners (J. N. and J. C. Bird) who owned during the years 1918 and 1919.

The said sum, was made up of two items, (1) £1,377, being the full amount claimable in respect of the deficiency arising in the accounts of the firm R. A. Bird & Co., for the year ending 31st December, 1915 and (2) £60 being duty on £150 which formed part of total deficiency of £2,075 arising in the accounts of the firm for the year ending 31st December 1919. If it was held that the interest of Mr. R. A. Bird passed to Mr. J. C. Bird, and terms of Section 36, Finance Act, 1922, the said sum of £13 6s. 1d. fall to be repaid to him under Section 38 (3) Finance Act, 1915.

It was contended on claimants behalf that in order to obtain the benefit under Section 36 Finance Act, 1922, the

claimants had to show that Mr. R. A. Bird's interest in the said business had passed to his son Mr. J. C. Bird, either by voluntary disposition *inter vires* made by Mr. R. A. Bird or under his will, that any deed or even verbal arrangement whereby interest had passed, constituted a disposition, that the contract above referred to form such a voluntary disposition by Mr. R. A. Bird of his 8/10 interest in the business, as he had been a party to them voluntarily. On the other hand, the Revenue contended that under the said contract there was no free gift, that this was not a voluntary disposition *inter vires* within Section 36, Finance Act, 1922, the claim to repayment under Section 38 failed.

The Commissioners agreed with and gave effect to the contention of the Revenue.

On a case being stated, the Court of Sessions upheld the Commissioners finding as above.

It was observed (per *Lord Saunders*) "Section. 38 (3) of the Finance Act, 1915, gives an equitable relief where Excess Profits Duty has been paid in one year and there is a deficiency in a subsequent year." The remedy is personal and does not subsist where there is a change of ownership of the business. It was held that the words "voluntary disposition" are terms of act in English and Revenue Law and they have been interpreted to mean, "without consideration or at all events without adequate consideration".

In this case the Court refused to allow the case to be remitted to Commissioners for a finding of additional facts, relating to which no evidence was led before the Commissioners.

R. A. Bird & Co. v. The Commissioner Inland Revenue.

12 T. C. 785 790,802,803 = 1925 S. C. 186 = 1925 S.L.T. 96

EXEMPTIONS.

Finance Act 1915, Section 39 (C) Exception under—
Limited Company carrying on auctioneers' business, not
entitled to—Personal qualification—element of, lacking.

Assessee company carried on the business of agricultural and general auctioneers, live stock salesman agents, farm managers, appraisers etc. In 1912, on the retirement of Mr. McIntyre,

from, the whole of the shares in the company were acquired by Mr. A. Fraser and his father, mother, brothers and sister, Mr. A. Fraser holding more than half. Mr. A. Fraser was the managing director of the company while his father and brother were directors and the entire conduct of business was in Mr. A. Fraser's hands. In 1919, the question of liability of surveyors, auctioneers and estate agents to pay Excess Profits Duty arose. An arrangement was arrived at between these and the Inland Commissioners, according to which in case of certain income, salaries and commissions, profits, to be excluded under Section 39 (c), Finance Act, 1915, were to be arrived at after deducting appropriate expenses. Assessee company were employed by the Ministry of Foods under the Meat Control Orders 1917 and earned grading fee and other remuneration, falling within the agreement above referred to. They also had receipts from sale of live stocks and movables falling within the said agreement too.

Persons desirous of becoming auctioneers did not require any special qualifications. On the above facts, the company contended that it was entitled to relief in terms of the arrangement between the Inland Commissioners and auctioneers, etc. and that they were so entitled to the extent of the business carried on by Mr. A. Fraser as the arrangement did not differentiate between business carried on by an individual and by a company.

The Crown contended that the above arrangement, relied on by the assessee was merely a working arrangement made by the department and that the case was to be determined by provisions of the Act and that the exemption under Section 39 (c) did not apply to the case of the assessee company which had a large capital, while Section 39 (c) covered a case of a profession which required no capital.

The Commissioners held the company entitled to the relief. On a case being stated the Court of Sessions in Scotland, however, revised the finding and gave judgment in favour of the Crown holding that the exception in Section 39 (c) did not apply to the cases, as it applied to professions requiring personal qualifications and the company in the present case required no personal qualification and that there was nothing in the arrangement, which only contained instructions, to qualify,

the Act, in this respect and if there was, it would have been *ultra vires* and the provisions of the Act would prevail.

1924 S. C. 345 ref.

The Commissioner Inland Revenue v. Peter Mc Intyre Ltd.

12 T. C. 1006 (1011,1914,1016).

Finance Act, 1915, Section 39—Fixed remuneration for managing Government ship by Ship-brokers —Not 'separate business'—exempt from Excess Profits Duty.

Assessee carried on business as ship-brokers and managers of ships for companies in which they were interested as shareholders. Sometimes early in 1917, they were asked by the Director of Transport and Shipping to undertake the management of a steamship belonging to the neutrals, which had been commandeered by the Government in the course of the war. They agreed to do so and their remuneration was fixed at £ 300 a year as managers and £300 year for acting as brokers.

A further superintendence fee of £ 50 was payable also for the use of the Finance Superintendent Engineer. Later on they were entrusted with and undertook the management of two more neutral ships.

During the accounting periods of one year ending 18th April, 1919 payments were received by the assessee company in respect of the last two ships as arranged, from the Government.

On assessment to Excess Profits Duty on the above sum, it was contended on behalf of the company that the business of managing neutral ships was a 'separate' business, being that of 'an agent' whose remuneration consists of a fixed and definite sum not depending on the amount of business done or any other contingency and was consequently a business the profits of which was not assessable to Excess Profits Duty. The Commissioners, being divided in their opinion, discharged the assessment to Excess Profits Duty relating to above profits.

The King's Bench Division agreed with the Commissioners and dismissed the appeal. On appeal, the Court of Appeal reversed the finding, holding that the profits were assessable to Excess Profits Duty, as the business was not wholly different,

severable and seyered and was not a separate business.

12 T. C. 41 ref.

The Commissioner Inland Revenue. v. Turnbull Scott & Co.

12 T. C. 749 (753, 761, 764, 766, 767) = 132 L. T. 296.

Finance Act, 1915, Section (C)—Exception under—Not applicable to profits of trade or business of an Insurance Broker.

Assessee carried on the trade or business of Insurance Broker in the County of York. He did not act as an agent for any insurance company. His part in the Insurance business was this. Upon receipt of the necessary instructions from any person wishing to effect an insurance against fire he surveys the premises to be insured and makes plans thereof; he advises as to any structural alterations the carrying out of which would, in his opinion, result in a reduction of premiums, and in conjunction with architects superintends the carrying out of such alterations; he draws up schedules of particulars of properties to be insured draft policies; he advises as to the company or companies with which the amount for which the insurance should be effected; and he negotiates with the company or companies selected, and carries matters through to their final conclusion.

About 6/7th of his business consisted of fire insurance relative to textile trade. On completion of necessary negotiations, assessee, informed the party of the premium payable by him. The party paid the premium to him which he paid on to the insurance companies after deducting commission at the rate which the company allowed to agents.

Assessee was not a member of the Surveyor's Institution but was a founder, and was on the Council of the Corporation of Insurance Brokers and Agents, London. He acted as a surveyor, valuer and appraiser only in connection with his own insurance work.

His moneys were accepted at Lloyd. On these facts, he claimed exemption from Excess Profits Duty under Section 38 (c) as carrying on a profession. The Revenue contended that within the last paragraph of Section 38 he was an agent

and as such assessable to Excess Profits Duty on his business which was not a profession.

The Commissioners upheld the contention of the Revenue that the assessee was carrying on a business and not a profession and was, therefore, not exempt under Section 39 (c).

This finding was upheld by the King's Bench Division, the Court of Appeal, with the observation that there was evidence before the Commissioners to support their finding of fact.

Durrant v. The Commissioner Inland Revenue.

12 T. C. 245 (249,251,256,261,265)=(1920) 1 K B. 801

Finance Act 1915—S. 39(c)—Profession or business—question of fact—Exception when applicable.

Assessee had been carrying on the business of Income-tax Appeal Agency and doing the work of an accountant for upwards of 20 years. He was not a chartered accountant, nor a member of any organized professional body. He had, however, from time to time, employed a chartered accountant as a member of his staff.

He specialised in income-tax, assisting people in the preparation of their income-tax returns and claims for repayment of income-tax and advised people generally on income-tax and Excess Profits questions. He was paid fixed fee for accountancy work. For his services, however, in connection with the repayment of and relief from income-tax, he frequently charged a percentage of the amount discharged or recovered by way of refund. This percentage varied, being $\frac{1}{4}$ th and $\frac{1}{3}$ rd in certain. No capital was required to carry on the assessee's business and he occasionally advertised. On assessment to Excess Profit Duty, he contended that he was carrying on a profession, the income of which was exempt from assessment to Excess Profits under Section 39 (c), Finance Act, (2),1915 and that his work required personal qualifications and not capital and that hence, he was not assessable. The Commissioners disallowed the contentions of the assessee and found that the case fell within the last paragraph of Section 39. The King's Bench Division (on appeal) upheld the Commissioner's finding.

On appeal to the Court of Appeal it was held that the question whether a particular trade was a profession or a business was one of fact and case was remitted to the Commissioner for a finding of fact as to whether they found that it was a profession and not business that the assessee carried on. The Commissioner found that the business was not a profession whereupon, the Court of Appeal upheld the finding of the Commissioner and the King's Bench Division that the assessee's case did not fall within the exemption under Section 39 (c).

Currie v. The Commissioner Inland Revenue.

12 T. O. 245 (248,253,257,261,265)=37 T. L. R. 371.

Sections 39, 44 and 45 (5)—Remuneration of advising engineer and courtesy director—assessability to Excess Profits—Action for declaration as to non-liability to make a return and to pay Excess Profits Duty.

Assessee plaintiff was by profession an advising engineer. In 1915, a company, desiring of making munition of war, sought his assistance. The negotiations resulted in an agreement according to which the plaintiff was to be paid 3d for each shell and 1d. for each fuse, as soon as payment was received from the Government by consulting and employing company. When the first 50,000 shells were to be completed and the price reduced, the allowance per shell was to be 2d. instead of 3d. By a further agreement, he was to be paid a retaining fee of £5 per week during the continuance of the war. In order to give him some official standing, he was to design himself on his printed cards as "Local Director for general contracts". The retaining fee was later raised to £10 per week. In March 1917, plaintiff received the usual form of notice from the Commissioner Inland Revenue, requiring him to furnish a return of profits of the trade or business in which he engaged during the accounting period for the purposes of Excess Profit Duty assessment. Plaintiff declined to furnish a return on the ground that his profits were not assessable to Excess Profits and that he was neither an agent nor a person taking commissions in respect of the transactions or services rendered with Section 39. He denied his liability to make a return under Section 44. On the case coming before the Chancery

Division (*Pelerson J.*) it was held that while the Court had jurisdiction to make such a declaration the exercise of such a jurisdiction was discretionary and a declaration where made was in cases where the Commissioner's requirement were wholly unauthorized [*i.e.* in (1911) 1 K.B. 410, 1912, 1 Ch. 158 1911, 2 Ch. 139 and 1912, 1 Ch. 173] which were distinguishable] the present case was not one where declaration could be given as sought by the plaintiff.

Smeeton V. Attorney General.

12 T. C. 166 (172, 173, 174) = (1920) 1 Ch. 85=88 L. J. Ch. 585=122 L. T. 223=35 T. L. R. 206.

Finance Act (1915) Section 39 (c)—Exemption claimed under by an editor & publisher of a magazine as exercising a profession—Allowed—Profits as publisher assessable.

Assessee purchased a magazine, the "National Review" for a sum of £ 1500 and was the sole proprietor, editor and publisher thereof.

From 1893 to 1905, the publication resulted in a loss but since that date profits had been made each year. Trading and profits and loss accounts and balance sheets were prepared annually to 31st May each year and the year to 31st May, 1915 was the first accounting period under Section 39, Finance Act, 1915. The profits of the first accounting exceeded the pre-war standard (*viz.* the average profits of the best two of the three pre-war years plus the statutory allowance of £ 200) by approximately £ 2,000. Duty on this excess at 50% was £ 1000 the amount assessed.

The appellant claimed exemption under Section 39 (c) as exercising the profession of an editor of a magazine. The "National Review" was a monthly magazine dealing with policies and matters of general interest, more particularly from the national and imperial stand-point. It was sold at s. 2 6 d a copy, or for annual subscriptions of 30s. The subscriptions were all paid in advance, the sales were for cash.

The earnings were derived from the sales of single copies, from subscriptions, from advertisements, and from sales of sundry publications, being reprints of articles which appeared in the magazine and were practically all written by the assessee.

The expenses were payments to contributories, costs of paper and printing, advertising distribution, rents and office expenses etc. The assessee bought the paper and had the magazine printed for him by an independent contractor. Prior to outbreak of war the assessee wrote a large part of each monthly number of the magazine himself, but the bulk of the matter was contributed by others. The sale of the magazine was due largely to the popularity of the assessee's own writings. When the last war (1914-15) broke out the assessee, fearing that the magazine might be ruined and to effect economy, greatly increased his personal contributions. From 1893 to 1905 onwards in years when the assessee failed to realize profits; he had to provide capital. In 1915, he required practically no capital to carry on the magazine.

On being assessed to Excess Profits Duty, the assessee claimed exemption by virtue of Section 39 (c) Finance Act, as carrying on a profession of journalism. He was a journalist, pure and simple, and the purchase of the magazine did not alter his position.

The Commissioners held that the appellant was entitled to the exemption claimed. On appeal, the King's Bench Division (per *Sankay J.*) gave judgment against the above decision. On appeal, the Court of Appeal held that the assessee was entitled to the exemption claimed as a journalist, and his profits as publisher, which were separable, were liable to be assessed to Excess Profits Duty.

The Commissioner Inland Revenue v. Marse

12 T. C. 41 (50, 56, 59, 62, 63)=(1918) 2 K. B. 715=C. A. (1919) 1 K. B. 647.

Finance Act, S. 39 (a)—company being manufacturing Chemists and herb-growers—assessment to Income-Tax under Schedule D—Deduction of Schedule B, assessment on land—Exemption claimed on ground of business being "husbandry" allowed.

Assessee company was incorporated under the Companies Act (1908), in 1912. It carried on the business of manufacturing chemists. It owned free-hold works and premises whereon it carried on the manufacture and distillation of herbs etc. It also

had an area of land and held some of the land under lease, upon which they grew herbs which were dealt with in their factory.

In computing the profits of the company for ascertaining its liability to income-tax, under Schedule D, its profits were viewed as a whole and a deduction of £ 22-17-0 was allowed for the occupation of farm under cultivation under Schedule B, Income Tax Act. On assessment to Excess Profits Duty under Finance Act (2) of 1915 the company claimed to exclude the profits arising from the cultivation of the farm, as having been derived from a trade or business separate from the business of manufacture of chemicals and drugs, distillation etc. viz, the trade and business of husbandry in the United Kingdom, which was exempt from Excess Profits Duty under Section 39 (a). The Crown contended that the company's business was one business and that there was authority in the Finance Act of 1915 for the division of one business into two parts.

The Commissioner found as a fact on evidence, that the company occupied the farm in connection with and mainly for the purpose of the factory in which the herbs grown on the farm were distilled and treated.

They were nevertheless of opinion that the farm occupation was "husbandry", the profits of which were liable to exclusion for the purposes of Excess Profits Duty. They accordingly reduced the assessment.

On appeal, the King's Bench Division also gave judgment against the Crown with costs.

On appeal to the Court of Appeal, held (per *Sankey J.*) that, as from the documents put in it appeared that the produce of the company was sold not only to the distillery but was sold in other places, and to other persons also, the finding being one of fact based on evidence, was correct and could not be interfered with and that if public policy, which lay behind the Excess Profits Duty Act was to be considered, it was to be considered on both sides. It was, accordingly, held that the business of the company, apart from the manufacture of drugs, was "husbandry" exempt under Section 39 (a) Finance Act, 1915,

and that they were, therefore, entitled to the exemption claimed.

6 T. C. 542 (550) ref.

The Commissioner Inland Revenue. v. William Ramson & Son Ltd.

12 T. C. 21 (24, 25, 29, 30, 31) = (1918) 2 K.B. 709 = 88 L.J.

K. B. 342 = 119 L.T. 369 = 34 T. L. R. 533.

Section 39 (a) Finance Act. (No. 2) ,1915—Excess Profits Duty—Exemption from Co-operative Dairy Society doing creamery business—Business if 'husbandry', within the exemption.

The Canvan Central Co-opertive Society Ltd., was established in the year, by a number of farmers in the district, for the better marketing of some of their farm products. It was duly registered under the Industrial and Provident Societies Act, 1893. The only business carried on by the Society, during the accounting period ending 21st December, 1914, was that of creamery. The method of working was this. The members, all of whom were farmers, brought milk each day to the creamery. This was entered in a supplier's pass book. The milk was churned, the skim milk returned to the suppliers and the butter sold. The process continued for a month, no cash return being made, during the period, to the suppliers of milk and no price or rate per gallon being struck therefor. At the end of each month, a meeting was held by the committee and the return for the yield for butter sold and also for the aggregate working expenses for the month were laid before the committee. The sum to be distributed for the past month's milk was thus ascertained and was subsequently received rateably by the suppliers and was in proportion to the respective quantities of milk supplied by each of them. The price thus received by the farmers on milk basis depended entirely on the total amount received for the butter. Cheques were issued to the suppliers in respect of the butter sales of the immediately preceding month.

Occasionally, the committee refrained from deciding out the entire proceeds at once and deferred paying a part thereof to meet some heavy expenses in any one month. These were treated as deferred payments and were ultimately distributed amongst suppliers, if not required for expenses.

For the period ending 31st December, 1914, the Society was assessed to Excess Profits Duty in the sum of £108. The Special Commissioner confirmed the assessment. On appeal, the County Judge was of opinion that in point of law there were no "Excess Profits", or "surplus of" the Society, which could be assessed with Excess Profits Duty under the Finance Act 2 of 1915. He was also of opinion that milk producing or the keeping of milk cows by a farmer for dairy purposes including the making of butter, was "husbandry" and that it did not cease to be so if two or three or more farmers joined together and worked for the common purposes of butter-making. He, therefore, allowed the exemption claimed and discharged the assessment to Excess Profits Duty. On appeal to the King's Bench Division, *held*: the manufacture and sale of butter was not such husbandry as the statute contemplated, that the business of the Society was, on the whole commercial, that it was doubtful whether Section 39, relating to the exemption claimed contemplated husbandry carried on by the Societies under Act of 1893, that Societies were liable to Excess Profits Duty unless they could bring themselves with Section 39, and that it did not appear quite reasonable that a Society liable to income-tax should be exempt from Excess Profits Duty. Hence, the assessment to Excess Profits Duty was held to be correct and was allowed to stand.

(Per *Madden J.*) A Society of the kind worked like the Cavan Society may be of great advantage to husbandmen but it would be a misuse of language to describe its operation as husbandry.

(Per *Kenny J.*) The work of this Society in connection with the milk which it received was not the work of producers but a mere mechanical operation which could not, in its essence, be regarded as husbandry.

The objects of the Society were composite conversion of milk into butter being one.

The Commissioner Inland Revenue v. The Cavan Central Co-operative Agricultural Dairy Society Ltd.

12 T.C. 1 (9,10,12), = (1917 jr R. 594 & 622

EXECUTORS OF DECEASED—LIABILITY OF.

Finance Act, 1915—Section 45 (2)—Executors of deceased not liable to assessment to Excess Profits duty—Distinction between Excess Profits—Duty and Income Tax on the point.

Assesseees were the executors of one Mr. Cohan, who was partner in a well-known firm of persons carrying on the business of building, hiring and charting ships. From 1906 to 1912, deceased carried on the said business alone. In 1912, he took four other persons with him into partnership (two of these being his sons). Deceased was a wealthy man and with a view to assist the business of his firm, he entered into agreement in his own name with shipbuilders for the construction of ships. He then transferred the ship either to a single ship company, promoted by him for the purpose or to clients of the firms. The purpose of the production and transfer of the ships was that H. E. Moss & Co. should be appointed brokers to the ship and earn their profits in the ordinary legitimate way. On three occasions the deceased contracted with shipbuilders to build him three ships, which were built and were transferred to a company who appointed H.E. Moss & Co., as brokers. In respect of these the deceased did not receive any profit apart from the fact that his own firm received the usual commission and brokerage on the building and management of the ships. The deceased made several other contracts for ship-building. One of these, the last, he made on 26th November, 1914 and the ship covered by this contract was still under contract, when he died. His executors found themselves liable to pay for this ship. The contract, looking at the state of affairs of the term, was a very profitable one. This vessel, when complete, was sold at a large profit of £ 57,000. The executors were assessed on this. They contented that they did not carry on any trade or business but simply realised the assets of the deceased.

The Commissioners disallowed the executors' contention in this as well as in another case of a similar nature, wherein the executors had acted similarly after death of the deceased and they confirmed the assessment.

The King's Bench Division upheld the said assessments.

The same were, however, set aside by the Court of Appeal with the following observations:—

"Now there is a peculiarity with regard to the Excess Profits Duty. While the tax can be collected from and is payable by and in respect of a business that is carried on it is to be paid, under Section 45, by the person for the time being owning or carrying on the trade or business or acting as agent for that person; but the system of the Income Tax Act whereby, if a return has not been made, a return can be asked for and an assessment can be made in respect of liability to income tax which was not paid by the deceased person, that particular system is not introduced into the Finance (No. 2) Act of 1915, which is the Act which imposes the Excess Profits Duty. The result is that, although it would have been possible to have collected excess profits in respect of such profits had the late Mr. Cohan lived, it is not possible to collect those profits from his executors unless the executors fulfil the terms of sub-section (2) of Section 45, namely, that they are persons for the time being owning or carrying on the trade or business in respect of which the profits arise. They cannot be agents for the late Mr. Cohan because upon his death that became impossible."

It was also observed:— "It is largely a question of degree as to whether or not a business is being carried on by the executors for their own purpose; or not."

(12 T.C. 303) ref.

Cohans' Executors v. The Commissioner Inland Revenue.

12 T.C. 602 (608,610,613,615,620)=129 L. T. 797=131 L. T. 377.

Finance Act, 1915, Section 45 (2) Finance Act, 1926—Section 38 Excess Profits Duty—Liability of Executors of deceased—carrying on trade of deceased.

Deceased commenced business as a wholesale jeweller and diamond merchant at Manchester until his death in June, 1927. In 1926, deceased was interviewed by representative of Inland Revenue and he admitted irregularities in his taxation affairs. In consequence, a notice under Section 38 (2) Finance Act 1926, was served upon the deceased by the Inland Commissioner to the effect that his liability to Excess Profits Duty was considered

to be as undetermined. The investigation of the deceased's affairs and his liability to Excess Profits Duty were still going on when he died. Early in 1930, assessment to Excess Profits Duty was made on the Executrices of the deceased.

By his will, the deceased left his real and personal property to his sisters but the will did not contain any specific direction to the sister to continue to carry on the business of the deceased. The executrices took legal advice as to their position and they were advised that they were not empowered to continue the deceased's business except for the purposes of realizing the assets as beneficially as possible. So the executrices decided to wind up the business as soon as was practicable. They did not employ any manager. The premises were kept open for sale purposes all along, except for the mourning week. No new sign bearing the names of the executors and indicating that the business was carried on by them was exhibited and no revised invoices or letter-heads were printed. Customers were notified that the intention was to close the business. In March, 1928, business premises were vacated, and therefore the last of the stock remaining in hand was transferred to the retail business. The rest of the stock which was old fashioned and was not suitable for the business was sold by auction for £ 1,011. The stock in hand at the death of the deceased was valued at £4,034. During the period from that date upto 31st March, 1928 when the premises were vacated the total sales effected, amounted to £ 7,984. Of this £ 3397 represented sales to the Rochdale (retail) business, £ 1,011 the proceeds of the sale of the stock sold by auction as above mentioned, leaving a sum of £3,576 derived from ordinary sale to other customers. During the same period goods were purchased to the amount of £ 1,572. Of this about £ 300 was in respect of orders given by the deceased before his death and the remaining purchases were made for enabling the executrices to fulfil orders from customers for longer quantities of certain classes of goods than they had in stock.

The executors on being assessed to Excess Profits Duty contended that they were not liable to assessment to Excess Profits Duty in their representative capacity as executors of the deceased, that the notice on the deceased under Section 88 (3) :

could not render them liable, that the trade or business to which the assessment purported to relate, had ceased on the death of the deceased and that the same had not at any time been owned and carried on by the assessees, the executrices of the deceased.

The Commissioners held that in the case of a person on whom notice had been served under Section 38 (3), Finance Act, 1926, before 30th September, 1929 his liability was undetermined and that the terms of the Section enabled the assessment to be made on the executors of the deceased and that in the present case the executrices, the assessees had continued to carry on the trade of the deceased.

The assessment was confirmed but reduced, as the trade was, on evidence, held to have been continued upto 31-3-1928.

On appeal the finding was upheld, by the Kings Bench Division.

Executrices of Phillip Weisberg, deceased v. The Commissioner Inland Revenue.

17 T. C. 696 (701, 704, 705)

EXCESS PROFIT DUTY. LIABILITY, AGREEMENT TO Finance Act, (1926 Section 38 (3) Excess Profits Duty Settlement of by mutual agreement—Notice of final determination valid.

For many years, Sir Walter H. Cookerline had carried on the business of ship-brokers and ship-owners under the style of W. H. Cockerline & Co. In the year 1925, the Commissioner of Inland Revenue, having reason to doubt the accuracy or adequacy of Sir Walter's return in connection with Excess Profits Duty set up an enquiry in the course of which Sir Walter's books and accounts were thoroughly investigated. It commenced from November, 1925 and continued until May, 1928. It became evident during the course of enquiry that very substantial sums were due from Sir Walter to the Revenue on account of Excess Profits Duty. A sum of £ 67,0769 was allocated to Excess Profits Duty out of the total sum of £10,710/- found out to have been unpaid. Upon this amount, the matter as to Excess Profits Duty had been finally determined. A mutual settlement at this sum was considered to be fair to the Crown and to Sir Walter. The settlement was according to the

evidence, intended by both the parties to be a final settlement of Sir Walter's liability.

On the 10th December, 1928, the Commissioners Inland Revenue gave notice to the assessee (Sir Walter) that in their opinion, all questions as to his liability in respect of Excess Profits Duty had been determined. On the 5th July, 1929 assessee gave notice of appeal against the said notice. The assessee's appellant contended that there having been no assessment in respect of any part of £ 67,076 paid under the name of Excess Profits Duty, there was no basis in law for the so-called settlement and that, therefore their rights and liability cannot be displaced by an agreement to pay duty which has not been assessed and that, therefore, the notice was erroneous. The Special Commissioner, having considered the evidence before them, found that all questions as to assessee's liability in respect of Excess Profits Duty and his right to any relief from or reduction or repayment of Excess Profits Duty had been finally determined on the 10th December, 1928 the date of notice.

The finding was upheld by the King's Bench Division and the Court of Appeal.

W. H. Cockerline & Co. v. The Commissioner Inland Revenue.

16 T. C. 1 (6,10,20,27). = 46 T. L. R. 493 = 144 L. T. 84 = 47 T. L. R. 13.

**EXCESS PROFITS DUTY—SCOPE & NATURE—
PROFITS—ASSESSABLE—REPAYMENT of E.P.D.**

Section 38 (3) Repayment of Excess Profits Duty—in case of loss. Amount repaid—profit of the year in which received, for income-tax assessment under Schedule D. Scope and nature of Duty—R. 4 (1) of the Rules under Schedule 1. Case I & II & S. 35 (1) Finance Act 1915.

Assessee company carried on the business of brick making. In the year 1904, it went into voluntary liquidation and the business was thereafter carried on by the liquidator until the year 1921. In 1921, the liquidator sold the business (including plants and good will) to E. M. Brick Co., Ltd., on 5th October, 1921, whereafter it was carried on by this latter company and the business of the assessee company ceased on that

date. Assessee company had been assessed to Excess Profits Duty from time to time under the provisions of Part III, Finance Act, 1915. During the final accounting period which ended 30th April, 1921, the assessee company made a loss and claimed a repayment of Excess Profits Duty under Section 38 (3) of the Act. The liquidator received two repayments of Excess Profits Duty in March and December, 1922, after the assessee company had ceased business. These repayments of Excess Profits Duty were treated as profits of the company assessable to income-tax for the year 1921-22 and 1922-23 and assessment was made in respect of these repayments under Rule 4 (1) of the Rules under Schedule D. Cases I & II, which is re-enactment of Section 35 (1) Finance Act, 1915.

On appeal, the company contended that the mere receipt of the payments of money did not amount to carrying on trade which was carried on after they had ceased business by the E. M. Brick Co. Ltd., that the repayment were received after the date they had ceased business and so their profits were not assessable under Case 1. Schedule D, that assessment under Case VI was not possible as the treatment of Excess Profits Duty repaid was dealt with by R. 4 (1), under Case I and II and that repayments not being annual profits or gains were not assessable under Schedule D. Case VI. The special Commissioners, following the previous decisions in similar cases, held that repayments were assessable under Schedule D, generally, irrespective of the notices, which were issued under Cases I and II and that the assessment was correct.

On a statement of case being submitted to the Court of Sessions, the Court held; the appellant assessee company was rightly assessed. Pointing out the nature of Excess Profits Duty and the distinction between it and income-tax it was observed: "In accordance with the nature of Excess Profits Duty, no assessment to that duty could be made except in respect of ascertained and assessable profits. Excess Profits Duty was simply a share of the net balance of profits and gains, in other words, of the actual profits computed by methods familiar under the income-tax Act of certain defined kinds of business or trades. A share of that net profits, corresponding

to the excess or such profit over and above the "standard profit", was appropriated by the Revenue under the name of Excess Profits Duty. But, in the computation of profits for the purposes of Excess Profits Duty, there was this peculiarity, that regard was held to the "accounting period", and not to the three years' average characteristic of the assessment of trading profits to Income Tax.

(Per Lord Sherrington):—

When it was enacted that the amount of Excess Profits Duty repaid "shall be treated as profits for the year in which the repayment is received" I think that the legislature intended that the sum so repaid should be deemed to be part of the ascertained and taxable profits of that year and should not merely be regarded as a factor for ascertaining the amount of the taxable profits of a subsequent year different from the year in which the repayment was received.

Eglinton Silica Brick Co. Ltd. v. Marrian. (H.M. Inspector of Taxes)

9 T. C. 92 (96, 98, 100) = 1824 S.C. 946 = 61 S.L.R. 601.

NEW BUSINESS

Finance Act (1915) Schedule IV Pt. II R. 4 & 5—New business set up—Pre-war standard of profits on the profits of original business not allowable.

Prior to April 1914, a millinery business was carried on for upwards of 40 years, under the name of "Emelie," by one Miss "W". In April, 1914, she retired and handed over to five of her saleswomen their own particular order books as the customers were in the habit of always seeing the same saleswomen. One of those was Miss Mills, who, later, formed a small private company in conjunction with other two milliners, one of them being the employee of the late Miss W. This company was titled, "Mills from Emelie Ltd." It was registered in 15th April, 1914. The company took in their employ 8 of the other saleswomen who had got the sales books from the late Miss "W", with about 15 more of Miss "W's" employees.

The company did not take over any assets or stocks or books or book debts or contracts or liabilities of Miss W; nor did it enter into any agreement with Miss W or any of her employees as to the good will of the business carried by the late Miss "W". Nor did the company obtain the consent of Miss "W" to the

use of the name of the firm. The Company opened their business at different premises at or about the same time as Miss W's business was closed. On being assessed to Excess Profits Duty, for the accounting period from 5th April, 1914, to 19th August 1914, the assessee company contended that their business was a continuation of and in succession to Miss W's business and as such, that the company's business having changed ownership since the commencement of the last three pre-war trade years within the meaning of R. 5, Part II Schedule IV, the provision of Part III, Schedule IV, should apply, as if the business had not changed ownership subject only to the modifications to be made under the said Rule.

The modification suggested was that the Crown should take as the pre-war standard of profits any two years of the business of "Emelie", alternatively that there should be taken as a profit standard a figure based on the pre-war trading of the assessee *viz.* of the period to 4th August 1914. A further alternative suggestion was that pursuant to the second Para of Schedule IV, Part—II, R. 4, Finance Act 1915, the pre-war standard of profits should be completed by reference to the part of trade of Emelie carried on by those persons who carried on the trade of 'Mills from Emelie Ltd., as if it was the same trade or business.

The Crown contended that the assessee's business could not be regarded as a continuation of the business known as "Emelie", that Rule 5 Part II Schedule IV of Finance Act, 1915 did not apply and that the assessment was correct.

The Commissioners found that the assessee had not succeeded to the business of Emelie and that their profits were assessable as those of a new business. They accordingly confirmed the assessment. On appeal, the above finding was upheld by the King's Bench Division (per *Rowlett J.*) with the observation that Miss W's business was discontinued and the assessee's was a new business altogether, not one of having changed ownership only.

12 T. C. 41 (Maxes Cases disting)

Mills from Emelie Ltd. v. The Commissioners Inland Revenue.

12 T.C. 78 (77,81,82)

NON-RESIDENT ASSESSMENT OF, THROUGH AGENTS.

Finance Act, 1915—S. 31(2) Assessment of non-resident for profits of trade exercised in United Kingdom—Agent, an authorized person carrying on regular agency—Assessment in agent's name good—scope of S. 31—Construction of S. 31(6).

Messrs. Bernasconi were Italian subjects, having their place of abode in Italy where they carried on silk trade. They appointed the assessee, Mr. Balfour, as their agent in United Kingdom in 1916, for the sale of all their products except certain articles. This agreement was to terminate on 30th July, 1919.

Under the agreement orders taken by the agent for transmission to the principals in Italy were not to be considered as accepted by the latter, till the purchaser got the principals copy order.

All goods were to be offered and invoiced on the terms specified on the copy order in the name of the principals. The agent was to get a commission of 30% on the net amount of invoices made during each accounting period. The agent was to maintain an office, ware-room accommodation and necessary staff at his own expenses while the principals were to pay him the postage and telegram expense and outlay for carriage and packing materials. The agent incurred no responsibility for bad debts but commission was not to be paid to him on any account forming part of a bad debt. The agent was to be credited with commission at the same rate as above on any business done direct with the principal by any customers from agent's market. The agent was free to act as such for others in any other line not clashing with the principals business. Though the agent was working for others also the bulk of business done by him was for Bernasconi, for whom he was the sole agent.

The course of business was this :—Balfour solicited orders from customers and transmitted them to the principal. If

the order was accepted, which was not always the case, the principal transmitted a form in duplicate to the agent who posted one copy on to the customer with another form. Goods were sent to the customer direct by the principal, through forwarding agents. The principals kept no stock in United Kingdom and had no room or office, and they did not contribute to the office of the agent.

Assessment was made in the name of the agent, who, thereupon, contended that the principals carried no trade in United Kingdom, that the contracts were all made in Italy and that there was nothing in Section 31(2) Finance Act, 1915 to render the non-residents chargeable in respect of profits of a trade not assessable within United Kingdom. The Commissioners held that principals Messrs. Bernasconi were in view of 31(2) Finance Act, 1915 (read with Section 41, Income Tax Act, 1842) liable to British Income Tax and had been rightly assessed.

The finding was upheld by the King's Bench Division (per *Rowlett J.*) with the observation that the assessee was the agent of Messrs. Bernasconi clearly within the meaning of Section 31(6) and that he was an authorized person carrying on the non-residents regular agency.

This finding was upheld by the Court of Appeal also. It was observed (per *Scrutton L. J.*)

"In 1915 a change was made in the statutory liability, and the change was this, "that by the Section 31 of the Finance (No. 2) Act, 1915, Section 41 of the Act of 1842 which allowed the agent in respect of profits to be assessed, was extended so as to make non-resident persons so chargeable though the agent may not have the receipt of the profits or gain of the non-resident."

It was further held (per *Scrutton L. J.*) following the decision in *Wilcox v. Pinto*, 9 T. C. 111 that the term "authorized person" does not mean a person having a full authority to carry on the business without consulting the principal abroad, that a regular agency can be carried on by a person only with authority but that the expression "authorized person" has made the meaning clearer. (per *Eve. J.*) "On the

question of the construction of sub section (8) of Section 31, Act, 1915, we are, undoubtedly, I think bound by the decision of this Court in the case of Wilcock v. Pinto". (9 T.C. 111).

Balfour v. Mace.

13 T.C. 539, (554,555 560, 561, 564). = 133 L.T. 385 = C.A. 138 L. T. 338.

Finance Act, 1915, Section 31—Assessment of non-resident through agent, agent an authorized person, carrying on regular agency.

Messrs. E. & P. Gavazzi, non-resident, Italian firm of silk manufacturers in Milan (Italy). Assessee took on the representation, in United Kingdom of Gavazzi, for whom they have since acted as sole agents in the United Kingdom.

Since 1890 and onwards, the assessee also acted for two or three other firms and to a certain extent carried on general business of their own. Their commission from Gavazzi, however, represented by far the greater portion of their total earnings. Gavazzi had no office in the United Kingdom neither had they any plate or room in the assessee's office. They did not advertise in the United Kingdom. Assessee had no written agreement from Gavazzi. No authority to accept orders vested in the assessee but they were able to quote prices from price lists received from Gavazzi.

The assessee had no stock of Gavazzi on hand nor did they have authority to deal with disputes with customers nor to sum them. Assessee was not responsible for bad debts. They got 8% commission on gross sales in the United Kingdom and the same amount on all orders sent direct by British customers, whether they were introduced by them or not. Goods always came to the assessee in order to be delivered to customers who were instructed to pay by cheques to the order of the assessee. Assessee advised Gavazzi weekly of the persons from whom money had been received by them together with the amount received. Assessee received the money until Gavazzi instructed them as to what to do with it. On assessment under Section 31 Finance Act, 1915, as agents of Gavazzi assessee contended that Gavazzi was neither resident

nor trading within the United Kingdom and that contracts were made abroad and that assesseees were general commission agents and not authorized person carrying on Gavazzi, regular agency. The Commissioner held that Gavazzi exercised a trade in United Kingdom and was rightly assessed in the name of agents. *Held*: on appeal by King's Bench Division (per *Rowlett J.*) that the Commissioner's finding was correct, that as contracts were made in United Kingdom habitually there was an exercise of trade in United Kingdom and that the assesseees were liable as agents under Section 31, Finance Act, 1915.

9 T. C. 111 foll.

E. & P. Gavazzi v. The Commissioner Inland Revenue.

10 T. C. 698=(702, 745, 747)=135 L. T. 634=42 T. L. R. 389.

Finance Act, 1915, Section 31(7)—Assessment of non-resident in the name of agent—Profits from sale by non-resident not received by London firm—Exclusion of, from assessment—effect of Section 31(2).

The Java business, established as far back as ninety years, was a business of merchants set up in the Dutch East Indies. They had a London agency to carry on the business. For many years the London Agency worked without remuneration, only on payment of expenses by Java firm. In 1916-17, a commission was fixed to be paid annually to the London firm, not to be less than £12,000 in any year. The London firm had no capital of its own. The course of business between the Java firm and London firm took various forms. On being assessed as agents of the London firm contended that they were not so assessable. It was held that in all cases whereon the London firm acted as agent of the Java firm, the London firm was assessable where the contracts were all made in the United Kingdom.

As regards the transactions carried through the assessee, agents in view of the provisions of Section 31(7) Finance Act, 1915, the profits arising from sale, to non-residents through the London Agency, where such profits were not received by the London firm where to be excluded from assessment in the name of the London firm as agents.

It was held (per *Rowlett J.* in the K. B. D.) The effect of Section 31(2) is that an agent is assessable, or to be more accurate, the non-resident is assessable in his name, in respect of the profits directly or indirectly arising from his agency. The consequence of the alteration of the law in 1915 will be vast increase in the number of cases in which the Revenue will be able to attach the profits made by non-residents by exercising a trade in the United Kingdom, but the important thing to be borne in mind is that the main question is still the same, namely: Does the non-resident exercise a trade within the United Kingdom.

8 T. C. 193 & 8 T. C. 382 ref.

(Per *Viscount Cave L. C.*)

Sub-section (7) of Section 31 has not yet received full consideration any reported case.

"This sub-section applies only to sales or transactions by a non-resident in circumstances which would make him chargeable in pursuance of this Section in the name of a resident person," and in the case of sales and transactions wholly made or entered into abroad, those circumstances do not exist. The sub-section must, therefore, apply to sales made here through an agent or other person resident here, and no construction can, I think, be accepted which makes it applicable only to sales made abroad. Having read the sub-section more than once, I have come to the conclusion that its intention and effect is to exempt from taxation in the name of a resident agent or other person in the position of an agent all sales and transactions between non-residents, even though effected through the medium of that agent or other person, except in cases where the agent or other person receives the profits.

Section 31 contains two provisions designed to avoid the danger lest so large an extension of the machinery for taxing persons, residents, abroads or transactions in this country should damage the position of the country as a centre of foreign trade and accordingly the section contains two provisions designed to avoid that result. Sub-section (6) ensures that a non-resident instructing a broker or other casual agent in this country shall not be chargeable in the name of such broker or agent in respect

of the profits arising from his activities, and sub-section (7), as I read it, provides that when one non-resident sells goods to another non-resident through the regular agent of the former in the United Kingdom and the proceeds of sales do not pass through the agent's hands, the agent shall not (in the absence of other circumstances which make him chargeable) be chargeable with the tax. In both these cases there were good reasons for the exemption; for in both cases the proceeds of the transaction would not normally pass through the hands of the broker or agent, who would, therefore, have no direct means of protecting himself against the charge of income-tax, and in both cases the imposition of the charge would tend to divert business from this country. It appears to me that the juxtapositions of the two sub-sections is not accidental and that similar reasons of policy may well account for them both. It is true that in order to arrive at this construction a wide meaning must be given to the expression executes, sales, or carries out transaction, for that expression must be held to include the actual contracts of sale but it is plain that the words, sales or transactions carried out, contained in sub-section (6) have that wider meaning, and it appears to me that like meaning must be given to the similar expressions in sub-section (7) the alternative is to hold that sub-section (7) is a mere unintelligible collection of words and this I am unwilling to do.

(Per Lord Shaw of Dunfermline.)

"With special reference to sub-section (7) of Section 31 of the Act of 1915 the House is confronted in this case directly, and apparently for the first time, with the necessity for a decision upon the question of what I will for shortness call 'double foreigner transactions', that is to say, transactions in which the goods of one foreign merchant are sold to another foreign merchant and are delivered direct from the vendor's premises in one foreign country to the vendee's premises, in another."

Granted that the goods passed from vendor to vendee as described, namely, without reaching or passing through this country, it is, however, one of the admitted facts of the case that the vendor namely the Java firm, had regular agents (the

London firm) and that the contract of sale for the goods so transferred, say, from Java to Vancouver was made in London. In substance nothing else took place in London. The payment was made into a credit by the Java firm with a London Bank, but was received by the Java firm in Java.

No point arises in the case as to the agency of the Appellants. It was not that of a firm casually employed or of a broker on change. The appellants were regular agents.

"My first proposition upon the Finance (No. 2) Act of 1915, Section 31, is that in my view no repeal either express or implied was effected on the liability of a foreign resident exercising a trade within the United Kingdom that foreign resident still remains liable to income-tax under the British taxation statutes. How he, the foreigner, is to be got at and the tax recovered from him is a question for the taxing authorities.

But the question before this house is not as to the liability of that foreigner direct but as to the vicarious liability of his English regular agent who has made the contracts in England. This raises the peculiar question of the position of those agents as persons responsible to the English taxing authorities for the taxation not upon profits which they themselves make by way of commission but also upon the actual profits of the transactions arising to their foreign principals.

It is manifest that the question is of wide importance, the object of the legislature being the imposition of a tax upon profits from all trade exercised in England but, upon the other hand, to avoid the injury to or destruction of that great volume of foreign trade the central exercise of which by the making of contracts is through agents in Britain.

But there still remains a large branch of agency business to be preserved, business which had neither the protection of a contracting party being here nor of the goods being here. These protections appear to me to be contained in sub-section (6) and (7). After full consideration I think these two sub-sections should simply be read together.

The first, namely, sub-section (6), is that a non-resident person is not to be chargeable in the name of a casual, but

only of a regular agent, and the second, namely, sub-section (7) is that in the case of what I have called "double foreigner" transaction the agent is not responsible in respect of profit arising from sales or transactions between one non-resident person and another non-resident person, that is to say, that "double foreigner" business, though transacted through a regular agent in England does not make that agent responsible for taxation upon it. To that extent, namely, when there is neither one of the parties to the transaction in this country, or when the goods never reach this country but are sent direct from one foreign country to another, the agent conducting the business in London has no vicarious responsibility for the taxation. That taxation will rest directly upon his principal in respect of having exercised a trade in England.

Maclaine & Co. v. Escott (H. M. Inspector of Taxes).

10 T.C. 481 (494, 545, 576, 577, 580, 581, 582 583.) K. B. 131 L.T. 601=C.A. 182 L.T. 173=H.L. (1926)=95 L.J.K.B. 616=135 L.T. 66 A.C. 424=42 T.L.R. 416.

NON-RESIDENT, ASSESSABILITY

Finance Act, 1915, Section 31—Assessability of non-resident through agent.

P & Co., cotton merchants of Alexandria in Egypt arranged with K to be their agent for the sale of their cotton in Manchester (U. Kingdom), He was to get 10% commission on sales as his remuneration, out of which he was to meet with his own expenses also. The business conducted by K took two forms: (1) He either sold cotton for P & Co. on their instruction as to limits of prices fixed by them, such sales being only specified quantities cabled by P. & Co. from time to time and the terms of each of which were separately fixed when cabling permission to offer any quantity. (2) to obtain offers to purchase cotton, the terms of which were transmitted by him to P. & Co. for their acceptance or rejection in these cases, the offer or acceptance was carried out by K on receipt of instruction from P. & Co.

Under the above arrangements goods were shipped and P. & Co. received payments upon bills drawn in Alexandria and discounted with a bank there. The bills so drawn and discounted,

together, with a copy of the bill of lading were forwarded by the discounting bank to the United Kingdom and the goods were only released to the purchaser upon his discharging and making himself responsible for the discounted bill. The assessee K took no part in the transactions mentioned. K was not responsible for bad debts and was at liberty to do other businesses not competing with P. & Co. but his only business was that of P. & Co. The name of P. & Co. was used in his letter paper but not displayed at his office. He had samples of Cotton which he showed to mills for securing orders.

On being assessed as agent of P. & Co., K the assessee contended that P. & Co. exercised no trade in United Kingdom and that he was in any case exempted under Section 31 (6), Act 2 of 1915. The Commissioner held that P. & Co. exercised no trade in United Kingdom and they discharged the assessment accordingly. The King's Bench Division on appeal affirmed the decision of the Commissioners. On appeal to the Court of Appeal, the finding of the Commissioners and the King's Bench Division was reversed and it was held that K was assessable for the exercise of trade by the principals P. & Co. in United Kingdom under Section 31, Finance Act 1915. (per *Banks L. J.*)

"The question, therefore, is whether or not upon the facts of this case it is shown that this non-resident person can be chargeable in the name of an agent who is an authorised person or carrying on the non-resident's regular agency. It seems to me that Mr. Kummer is carrying on Messrs. Pinto's regular agency in Manchester—'in your market', as the letter describes it. The only question, therefore, is: Upon the true construction of this sub-section is he an authorised person carrying on the non-resident's regular agency? Well, I say, as Lord Justice Brett said in the case, I have already quoted, it would be very unwise to attempt an exhaustive definition of what constitutes an authorised person, but it seems to me that in this case, in reference to part of the business which he is employed to carry on, class (a), there can be no question that this gentleman, Mr. Kummer, is an authorised agent to carry on Messrs. Pinto's regular agency".

(Per Lord Scrutton L. J.)

Before the Act of 1915, to assess through an agent you must assess an agent having the receipt of profits and gains, and Mr. Kummer, about whose position I will say a word or two in a moment, did not receive the money due as price, and consequently was not in receipt of profits and gains. But in 1915, a change was made in the machinery of assessing non-resident principals. Section 31 of the Act of 1915 in its first sub-section allowed non-resident persons to be chargeable in the name of their agent, although the agent may not have the receipt of profits or gains of the non-resident. That was followed by sub-section (2), which positively enacted that a non-resident person shall be chargeable in respect of any profits or gains arising whether directly or indirectly through an agency. Now, I am disposed to agree that it is rather difficult to know what that clause exactly means. At any rate I have the guidance of the House of Lords, in *Smidth v. Greenwood* (8 T. C. 193) that is not a new charging Section. I think it is clearly a new machinery section, that it does not impose an additional charge on the non-resident. Then comes sub-section (6), which is of importance in this case: "Nothing in Section 41 of the Income Tax Act, 1842 (as amended by any subsequent enactment or by this section), shall render a non-resident person chargeable in the name of a broker or general commission agent, or in the name of an agent, not being an authorised person carrying on the non-resident's regular agency."

Wilcock v. Pinto & Company.

9 T. C. 111 (118, 125, 131, 136, 137)=(1924) 1 K. B. 304
=93 L. J. K. B. 149=129 L. T. 534=(1925) 1 K. B. 30=94 L.
J. K. B. 101=132 L. T. 74.

Finance Act, 2 of 1915—Section 31(1) & (2)—Effect and scope. (Per Rowlett in *K. B. D.*)

The scope of Section 31(2) Finance Act, 1915 is not very clear but its effect is not to bring into taxation profits made by non-residents from a trade not exercised in the United Kingdom to make an extension in the scheme of taxation of that magnitude and importance the Court is entitled to look for words of clear and direct enactment.

Per Master of the Rolls Lord Sterndale:—"Section 31, sub-section (1), I think clearly does nothing more than extend the method provided by Section 41 of carrying out the charge imposed by Schedule D, and it would be very strange if another sub-section of the same Section imposed an entirely new charge not within the Schedule at all. I agree with Mr. Justice Rowlett that such a thing, if intended, should be carried out with the greatest clearness, and that, if a reasonable meaning can be given to the sub-section without producing that effect, it should be done. I think this meaning can be given to it by adopting the construction suggested by the respondents, namely, that it merely points out or, so to speak, sums up the effect of Section 41 of the Act, of 1842, as extended by Section 31 of the Act of 1915 still keeping within the limits of the charge of Schedule D. It is true that, looked at from this point of view, sub-section (2) is not of much use and might have been left out without much, if any, loss of effect, but redundancy is not unknown in legislation. I think it is better to impute such redundancy than to hold that such an important alteration has been made in the basis of taxation as the abolition of the condition of exercise of trade within United Kingdom before a person not there resident can be taxed. To take the latter course would, I think, be to violate the well known canon of construction of taxing Acts that no one is to be taxed except by express words.

Per Lord Buckmaster—It is, I think, important to remember the rule, which the Courts ought to obey, that, where it is desired to impose a new burden by way of taxation, it is essential that this intention should be stated in plain terms. The Courts cannot assent to the view that, if a section in a taxing statute is of doubtful and ambiguous meaning, it is possible out of that ambiguity to extract a new and added obligation not formerly, upon the tax-payer. Sub-section (2) here is at the best a sub-section of an extremely doubtful character, and I think there is very great weight in the argument that has been placed before your Lordships by Sir William Finlay and Mr. Bramber that, as the original charging power of the earlier statutes was derived from their Schedules, if it were desired

to affect and alter the operation of those Schedules some clearer and better reference should have been made to their terms than the obscure and indirect reference that must be found in the Section under consideration."

F.L. Smidth & Co., v. F. Greenwood.

8 T.C. 193 (199) = (1920) 3 K. B. 275 = 89 L. J. K. B. 993
 = 124 L. T. 192 = 36 T. L. R. 760 = (1921) 3. K. B. 583 = 37
 T. L. R. 949 = (1922) 1 A. C. 417 = 91 L. J. K. B. 349 = 127
 L. T. 68 = 38 T. L. R. 421.

FOREIGN POSSESSION—PLACE OF ASSESSMENT.

Finance Act, 2 of 1915 Section 32—Territorial jurisdiction—Place of assessment in case of foreign possessions profits—Scope of Section 32.

Section 32 of Finance Act of 1915, in a way, repealed Section 108 Act 2 of 1842 containing provision as to foreign possessions.

By Section 32, the whole of the liabilities including those in respect of foreign possessions, were swept into the operative part of Section 32 and the places indicated as to where any liability under Schedule D. was to be ascertained.

The Act of 1918 has replaced both the Act of 1842 and the Finance Act of 1915 and Section of the Miscellaneous Rules applicable to Schedule D now lays down the rules as to the territorial jurisdiction of assessment.

Rex v. Marylebone (Income-tax Commissioners)

13 T. C. 746 (768).

PROFITS ASSESSABLE.

Excess Profits Duty—Pooling arrangement between Ministry of shipping and coal merchants—Profits of surplus stock at close of pool and of address Commission—Interest on profits after close of pool—Assessability to Excess Profits Duty.

Assessee company carried on business as ship's bunkers, oil, fuel merchants and coal exporters.

At all times material to the case, the company had a coal-ing depot at Gibraltar for the supply of bunker coal to merchant

vessels of all nationalities. There were eight other merchants also doing the same business at Gibraltar.

Upon the outbreak of war in 1914, the coal trade at Gibraltar having suffered severe dislocation, the price of coal rising rapidly as a consequence.

1917, the assessee company having been approached by the Government, a pooling scheme was formed in December 1917 and was agreed to by all the parties.

It worked from 1st January, 1918 and was continued until 15th March, 1919.

The pool was closed on 15-3-1911 and on this date there was a nett surplus of 38,515 tons, the value of which was £30,4,197-12-8 of which £179,215 was allocated to the assessee company's coaling depot. The company retained an aggregate sum of £33,117 as "address commission." This was the usual commission of 2% allowed on the freight on signing the bills of lading, by the ship-owner to the charterer.

The Government claimed the entire surplus stock value of coal and the "address commission" amount and the Gibraltar merchants resisted the Government's claim. Except the assessee company, who were of opinion that the merchants had no right to either of the two. Negotiations on the subject terminated in or about July, 1923, when the assessee company received a sum of £89,607, in respect of surplus stock and interest accrued therein to date of payment and £17,211 on account of "address commission" (paying $\frac{1}{2}$ i.e. a similar amount to the Accountant General Shipping Liquidation Department of Board of Trade).

The company's accounts were made up to 30th June, each year.

The company contended that the two sums were not profits of the company arising from trade or business and were not assessable to Excess Profits Duty, that the interest was not profits, that the said sums did not at any rate, accrue as profits to the company during the accounting period, as these were paid to them under the settlement of June, 1928. The Commissioners held that the two sums were assessable to Excess Profits Duty as profits arising from trade or business of the company and

were liable **Excess Profits Duty** during the accounting period to 30th June, 1918 and 1919. The finding was upheld both by the King's Bench Division and the Court of Appeal.

12 T. C. 927 ref.

Lambert Bros. Ltd. v. The Commissioner Inland Revenue.

12 T. C. 1053 (1064,1069,1076,1081).

Excess Profits Duty—Compensation for debenture of ship paid by Government—Profits of trade—Accounting period.

Assessee company carried on the business of ship-owners. In and prior to the year 1920, the company were the owners of two ships which were sold in November, 1921, and March 1924. One of the ships of the company was detained when it was to sail with cargo, and was released after a detention of 15 days and 1½ hours.

Similarly, the other ship was detained for 19 days. The company lodged a formal claimant for compensation. Ultimately, the company was paid a sum of £1,078 as compensation in April, 1924.

This sum was treated as the assessee company's trade receipt for the year ending 31st December, 1920, and assessment was made thereon and confirmed the appeal by the special Commissioners.

The above finding of the Commissioners was upheld both by the King's Bench Division and the Court of Appeal.

12 T. C. 427 Expl.

Ensign Shipping Co., Ltd. v. The Commissioner Inland Revenue.

12. T. C. 1169 (1173,1176,1180,1181)=138 L.T. 190 and C.A. 199 L.T. 111.

Finance Act (1915) Sections 38 & 39—Owner of ship and steam drifter using it for fishing—Hiring it out to Admiralty compulsorily—Profits from hiring part of profits of trade or business—liable to assessment to Excess Profits Duty.

Assessee was the managing owner of a steam drifter, "B. Sutherland" which was owned jointly by him and his two sons. Prior to November, 1915, he and his said two sons had owned

and worked a sailing boat for the purposes of catching fish for sale. The drifter, built in 1915, (completed in October, 1915) was acquired by them for use for the same purpose and was engaged in the herring fishing for a few weeks until 15th December, 1915 when it was requisitioned for use by the Admiralty, on terms fixed by the latter and embodied in a charter party dated 12th January, 1916, was a hire purchase agreement, more or less. The Admiralty had the option, at any time, after giving notice to the owners, the option to purchase the drifter at a price of £ 3,048. The terms of agreement were later amended in October, 1916, according to which for the sum above stated, the market value was to be paid on purchase. Another article in the amended agreement provided that the compensation payable by the Admiralty in respect of the loss of the ship was to be computed on the basis of its market value at the time of such loss. By another clause, the rate of hire was also increased from £ 45-14-5 to £ 60-17-8 per calendar month. For the short period during which the steamer was engaged in the business of herring fishing, certain profits were earned, which, according to the trade custom accrued, in certain shares to the boat, the net and the crew and the assessee as the owner of the boat got $\frac{1}{3}$ of the profits for the period ended 15th day of December, 1915, as the boat's share thereof.

Accounts for the period ending 31st March, 1916 were made by the assessee and furnished to the Surveyor of Taxes in response to an application for a return for the purposes of assessment to income-tax and the amount received from the the Admiralty by way of hire was included in the said accounts in the credit side together with the above-mentioned $\frac{1}{3}$ share of boats share of profits from fishing. Assessment to Excess Profits Duty for the accounting period ending 31st March, 1916 was made by including the Admiralty hire less expenses and depreciation, and the pre-war standard as a percentage standard based on prime cost loans. It was, thereupon, contended by the assessee that the owners of the drifter had not during the accounting period, or at any event subsequent to the 15th December, 1915 carried on any trade or business and that the payments received from

the Admiralty in respect of compulsory acquisition did not form of the assessee's trade or business, but represented compensation to them for having been deprived compulsorily of the means of carrying on their trade and that hence such payments could not be legitimately be taken into account for Excess Profits Duty purposes.

The Surveyor of Taxes contended that ownership of a vessel for the purposes of profits was a trade or business.

The special Commissioners, (relying on *Attorney General v Borrodale*, [(1814) 1 Price 148] found that the letting on hire of the drifter to the Admiralty was trade or business and that, therefore, the assessment was correct.

On a case being stated at assessee's request, for the opinion of the Court of Sessions at the Court of Exchequer in Scotland, the latter gave judgment for the Crown. It held that the assessee acquired the ship as an instrument or...as "a commercial asset, susceptible of being put to a variety of different uses in which gain might be acquired and that whichever of these uses it was put to by the assessee and profits earned, he was carrying on the same business, that though the fishing was a different industry from the uses that the ship was later put to by Admiralty viewed from the standpoint of the owners, they were the same as in each his vessel earned profits and was employed for gain.

(1750) 1 Ves. Sen, 496. (498, per *Lord Hardwicke* ref.)

Sutherland v. The Commissioner Inland Revenue

13 T.C. 63 (68,69,70,71)=(1918) Sess. Cas. 788=55 Sc. L. R. 674.

Section 38 & 39, Finance Act, of 1915—Income of annuity payable for fixed periods—assessability to Excess Profits Duty.

Assessee company was engaged in the manufacture of dyes, including the manufacture of synthetic indigo. After the outbreak of the war, it having become necessary to increase the manufacture of dyes in the United Kingdom and for this purpose the assessee company acquired a factory for the manufacture of synthetic indigo. Thereby, the company acquired the knowledge of the several process of making the said indigo. The

same necessity having arisen in United States of America, an American company also, previously engaged in the manufacture of explosives, decided to embark on the manufacture of dyes.

For this purpose, the American company entered into an agreement with the assessee company in 1916. Under the said agreement, the two companies agreed to communicate to each other all such information as they then possessed or controlled in connection with the manufacture of dyes, intermediate raw materials, including particulars of all patented or secret processes and of all apparatus, machinery and plant for such manufacture. Assessee company was to get from the American company £ 25,000 each year for ten years, starting from 1st July, 1917 to 1st July, 1927, the first payment to be made on 1st July, 1918. A royalty of 5% was payable by each party to the other for disclosing a patented or secret process and for obtaining a license in respect of the same.

The agreement was for a fixed period and related to a particular territory. In arriving at the profits of the company for Excess Profits Duty purposes the several sums of £ 25,000 falling due in the accounting periods covered by the assessment were included.

The company contended that its agreement with the American company was one of sale, of its principal capital assets, i.e. its special knowledge of the secret processes, and the exclusive right to use those processes and the company patents and that, therefore, the sum received in consideration thereof was not a receipt of trade assessable to Excess Profits Duty.

On the other hand, the Revenue contended that the several sums referred to were income or business receipts, properly included in the profits for Excess Profits Duty purposes.

The Commissioners upheld the contention of the Revenue. On a case being stated, the King's Bench Division also upheld the above finding, which was sustained by the Court of Appeal also.

British Dyestuffs Corporation (Blackley Ltd.) v. The Commissioner Inland Revenue.

12 T. C. 586 (593, 595, 601) = 129 L. T. 536.

Section 38—(Finance Act, 1915) Excess Profits Duty—Profits from sale of patents—assessability.

Assessee company was incorporated in October, 1906 to purchase and acquire in the United Kingdom or elsewhere, any patents, patent rights, *brevets d'invention*, licenses concessions etc., improving them, using them, and turning them to account and with special purpose of acquiring from a Mr. Rees and Thomas Parker & Co., Ltd., the rights in regard to a particular invention that had relation to centrifugal turbine pumps. The company carried on business in conjunction with the vendors in whom one third of their right in foreign patents was reserved. The company undertook from the beginning never to manufacture under these patents but it was either to grant licenses to other people to manufacture or to deal with the patent as it thought fit. In the course of its business the company acquired further patents in France, Switzerland, Belgium, Germany, the United States of America, and the Dominion of Canada. It dealt with the patent rights with regard to the United States by granting to an American company the right to use the invention, which the patent protected, upon terms of paying certain royalties, with an ultimate rights of acquiring the whole patent by purchase. As a result of the various agreements, entered into by the company, there was a substantial sum of money owing in respect of royalties from the American and this sum, brought into account with another sum made up the purchase price of £ 26,500 for which the patent was sold. The company's share of this sum, less expenses, was assessed to Excess Profits Duty (in addition to income-tax.)

The company contended that the patents sold were capital assessments, that in selling the patents the company was realizing a part of its capital assets, that the company had not made a business of buying or selling patents but had acquired only a part share as tenants in common of a single group of patents relating to one invention and improvement thereof with the main object of holding such patents and obtaining an income from royalties for use of them and that the sum received by them was not assessable to Excess Profits Duty.

The Commissioners held that the profits on sale of patents arose in the course of the company's business and were as such assessable to Excess Profits Duty.

The King's Bench Division on appeal, upheld the above finding. The Court of Appeal, however, decided against the Crown. *Held*, an appeal (by the House of Lords) that the profits from sale of patents were assessable to Excess Profits Duty. The findings of the Commissioners and the King's Bench Division were restored and that of Court of Appeal set aside.

5 T. C. 159 (166) & 1914 A. C. 1001 ref.

The Rees Roturbo Development Syndicate Ltd. v. The Commissioner Inland Revenue.

13 T. C. 366, (377, 383, 394, 398)=(128) 1 K. B. 506=
H. L. (1928) A. C. 132=96 L. J. K. B. 944=97 L. J. K. B.,
317=138 L. T. 598=44 T. L. R. 307.

Finance Act, 1915, Section 38—Excess Profits Duty—Profits of "turning over a mill assessability."

In the year 1919, there was a boom in the Lancashire spinning trade. Many spinning mills were being sold by their old proprietors or were passing from one set of shareholders to another. Where the shares in a spinning company changed hands it often happened that the old mill manager was dismissed by the new Board of Directors and a new one engaged, who was personally known to the group of men who had obtained control of the business. Assessee, who was manager of one spinning company and director of another, joined with one Mr. W. & three others who were also connected with cotton trade. These five persons were able between them to command sufficient funds on credit to undertake the purchase of all the shares of a limited mill spinning company. As a result of negotiations opened with the company, the five persons bought in August 1919 all the shares of the company for a sum, including a sum paid to the directors of the company for loss of office. They then liquidated the old company and formed a new company which should buy from the liquidators all the assets and liabilities of old company. Having been allotted all the shares in the new company the five associated persons retained the director's qualification shares (2,000) and sold the remainder at a profit.

Transactions of this nature (known locally as turning over a mill) were very common in Lancashire at this time. Assessee entered into another similar transaction and his activities in this direction having become generally known he was approached in 18 further cases out of which he selected two. In all these four cases, the assessee formed syndicates, sold shares of the new and became director, making profit in each of such transaction.

He was assessed to Excess Profits Duty on such profits. *Held:* the assessee's activities constituted a trade and that he was rightly assessed to Excess Profits Duty.

Pickford v. The Commissioner Inland Revenue.

13 T. C. 251 (258, 266) = 138 L. T. 500 = 43 T. L. R. 659 = 44 T. L. R. 15.

Section 38 (3)—Excess Profits Duty—Assessability income from of "shop rights" purchasers consequential on sale.

Assessee was the managing director of a limited company and in addition carried on the business of selling yarn and machinery on his own account. He was also inventor of apparatus for dyeing. In 1912-13, he invented a new process of beam-dyeing he took out six patents for apparatus for dyeing by a new process in the United Kingdom in the course of 1912, 1913 and 1914 and subsequently took out corresponding patents in the United States of America. The assessee exploited this invention in the United States by entering into agreements with various cotton manufacturing companies there, under which he received various sums from six companies in that country. In each of these cases, there was an original agreement and a subsequent memorandum of agreement. The memorandum of agreement provided for a separate consideration equal in amount and additional to the consideration specified in the original agreement. The second instalment was made payable only a considerable time after the signing of the original agreement. The company contended that the sums payable under the agreements with the respective companies were paid for acquisition of and an exclusive license for use by the company of the patented and secret processes in limited area, (called "shop rights") that the sums paid were portions of patent rights, which were to be left out of

account in computing the appellant's liability. The Commissioners held that the profits of the business of inventor carried on by the assessee was not separable from the profits of the business of selling machinery and that the whole profits were assessable to Excess Profits Duty on income-tax principles. The finding was upheld by the King's Bench Division (per *Rowlett L. J.*) It was observed: "Looking at the matter as governed by the original agreements only, they (the Commissioners) say that the leading transaction in each case was the sale of the machines and this grant of the shop-right was consequential on the sale. They have held that the moneys received from the sale of the shop-right are to be included with the money received from the sale of the machines as profits of the assessee's business. I do not think it is possible for one to reverse the view which the Commissioner have taken.

Brantwood. v. The Commissioner Inland Revenue.

14 T. C. 44 (55, 77).

PROFITS ASSESSABLE—COMPENSATION.

Finance Act, 1915, Section 40(1) & (2) and Schedule IV Part I, R. 1 Part II, R. 1—Excess Profits for Excess Profits Duty purposes—Computation of pre-war standard—compensation and damages received by Fire-clay company not profits—assessable.

Assessee company carried on business as manufacturers of clay goods and as merchants of raw fire-clay. It was the lessee of numerous clay fields. It was also the lessee of fire-clay at Gartverrie Glenberg and in 1908 its working having approached the Caledonian Railway line running over that field, on the 25th January 1908, the company gave notice of its intention to work that fire-clay, to the Caledonian Railway Company. The Railway took the position that fire-clay was not mineral and that it was the property of the Caledonian. On the company repudiating the claim and proceeding to work the fire-clay underneath the Railway line, the Caledonian Railway raised an action of interdict against it to prevent it from working the fire-clay underneath any part of the Railway at Gartverrie point.

On the 28th February 1908, *interim* interdict was granted. It remained operative till it was recalled by the House of Lords ultimately on 28th April, 1911.

During the two periods of interdicts, from 29th February, 1908 till 15th April, 1910 and from 12th November, 1910 till 28th April, 1911, the company had to bear the expenses of keeping open in a workable state the portion of fire-clay field which it had been interdicted from working, although the company was not getting any return during these periods from this expenditure. The expenses so incurred were debited to the company's revenue account.

Following the decision of the House of Lords to the effect that fire-clay was mineral and so was excluded from Caledonian conveyance, the Caledonian by notice dated 29th June, 1911 intimated its desire in terms of its powers under the Railway clauses consolidation (Scotland Act, 1845) that a certain portion of red fire-clay should be left unworked and offered compensation therefor. They gave further two notices offering compensation, in respect of other portion of fire-clay.

The clay covered by these three notices formed a small portion of the interdicted area. Finally, a sum of £15,316-11-4 was determined by arbitration as the amount of compensation which was paid with interest by the Caledonian to the assessee company.

The said sum and relative interest was credited to the revenue account of the company for year ending 31st August, 1913. Income-tax was duly paid by the company on the said sum.

On the 29th August, 1913, the assessee company received payment from the Caledonian a sum of £4,500 as compensation for damages suffered by the company in respect of interdict proceedings and the company granted a discharge in respect thereof to the Caledonian. Income-tax was duly paid on this sum.

As to Excess Profits Duty, the pre-war standard of profits of the company fell to be fixed on the average for the years ending 31st August, 1912 and 1913 respectively.

In arriving at the pre-war standard of profit the Surveyor of Taxes contended that there should be eliminated from the company's revenue account the aforementioned two sums received by it as compensation and damages. The company contended that these should not be eliminated. The company contended that by accepting income-tax on the above sums, the Inland Revenue could not eliminate them from revenue and that these should be treated as income and not capital, for Excess Profits Duty purposes, in ascertaining the pre-war standard of profits.

The Commissioners holding the computation to be on proper basis, confirmed the assessment to Excess Profits Duty as made. On a case being stated, the Court of Sessions (of seven judges) by a majority upheld the Commissioner's finding (Lord Salveson dissenting on both the points and Lord Ormdale on the point of damages). On appeal to the House of Lords, there was unanimous judgment in favour of the Crown, upholding the Commissioner finding and confirming the decision of the Court of Sessions.

As to the sum of damages a compromise was arrived at according to which a part of the sum was treated as trading receipt and this was not accordingly dealt with by the House of Lords.

The Glenberg Union Fire-clay Co., Ltd. v. The Commissioner Inland Revenue.

12 T. C. 427, (134,458,459,460,461,462,466.)=(1921) Sess. Cas 400=(1922) Sess. Cas (H.L.) 112=58 Sc. L.R. 378=59 Sc. L.R. 162.

Finance Act, Section 38, Profits of trade—Accounting period—Compensation for cancellation of Contract, trading profits assessable.

Assessee company carried on the business of chalk, quarry-owners and sellers of chalk. It made its accounts upto 31st December, each year.

The company entered into a contract, on 21st October 1912, with another company, the latter agreeing to purchase a certain quantity of chalk for ten years from 1st January, 1914.

The assessee company built a new wharf under the contract at a cost of about £ 8,000 thus performing their part of the contract. The purchasing company had agreed to

purchase not less than 75,000 tons of chalk each year during the ten years of the contract.

Delivery of chalk under the said contract was made and taken for some time but during the war the purchasers had difficulty to find ships for transport.

Delivery was, therefore, suspended. Later, the purchasing company approached the assessee company to relieve them of their further liability to purchase under the contract. By an agreement, the contract was cancelled the purchasing company paying £ 900 per annum for four years, from 1st January 1920 to 1924. There was no formal agreement executed but the terms were negotiated at verbal interviews and by correspondence. By further negotiations it was finally agreed, in August, 1920, that the assessee company should receive a lump sum of £ 3,000 in full settlement. This sum of £ 3,000 was paid to the assessee company, on 13th August, 1920.

The company applied the said sum in writing down the cost of the erection of the wharf.

The company contended that the sum was a capital payment and not a trading income. The Commissioners allowed the company's contention. On appeal, the King's Bench, (per *Rowlett J.*) reversed the above finding deciding in favour of the Crown.

12 T. C. 955 Disting.

The Commissioner Inland Revenue v. The North Fleet Coal and Ballast Co., Ltd.

12 T. C. 1102, (1106, 1009, 1110).

PROFITS ASSESSABLE—COMPENSATION.

Excess Profits Duty—Compensation for loss of sale on prices under control of Food Controller—profits of trade.

Assessee carried on the business of Millers for many years prior to the war. During the war a number of regulations were made relating to mill business and under these regulations a very considerable control was imposed on them. In consequence of these regulations and orders, assessee's business was carried on under the control of Food Controller

from the 30th April, 1917 to 31st March, 1921. They were compelled to sell and buy at prices fixed by the Controller. The losses in consequences were agreed upon to be made good to them.

During the period from 16th September, 1917 to 5th January 1918 there was a loss of some £ 53,000 and the assesseees were paid £ 59,141. From the 6th January, 1918 to 31st December 1918, the loss was £ 183, 560 and they were paid a sum of £ 197,280. In the next two years also, similarly, large sums were paid to the assesseees to make good the loss which was suffered by them in the course of carrying on their business by reason of the control.

The assesseees contended that these sums were not their trading receipts but were paid to them as compensation for direct loss and damage sustained by them by reason of the Food Controller's interference with their business. The Commissioners held that the sums received by the assesseees were their profits assessable to Excess Profits Duty. The King's Bench Division and the Court of Appeal also upheld it.

12 T.C. 1169

12 T.C. 427 and } Referred.

12 T.C. 927

Charles Brown & Co. v. The Commissioner Inland Revenue

13 T.C. 1256 (1265, 1275, 1277, 1278, 1282)

Finance Act, 1915, Section 38—Profits of trade—compensation received as consideration for cancellation of contract—Allocation of, to period when paid.

(1) Assessee company carried on business as ship-builders. In February, 1920, the said company entered into contract with a Steam Shipping Company to build a steamer for the latter company. In March, 1920, the assessee company entered into contract to build another steamer for the said company. The Steam Ship Company cancelled the contracts and paid £100,000 to the assessee company as compensation, on 26th November, 1920.

The assessee company carried the amount to the credit of suspense account.

It contended that it was a capital receipt and not a profit, a compensation, in fact, for being prevented from exercise of trade and that, even if it was a revenue receipt, it should be apportioned over the various periods in which the said contracts would have been performed.

The Commissioners were of opinion that the said sum was liable to Excess Profits Duty, subject to such deductions as might be agreed between the parties and that the period in which it was to be charged was the period in which it was received.

(2) In the other case, the assessee company, also a ship-building company entered into a contract to build a ship for a Steam Ship Company. The latter was to pay the cost of labour and materials to be employed in the construction of the ship and in addition a sum of £38,000 and a further sum of £15,000 to cover the cost of machinery and boilers. Payment was to be made by instalments, £10,000 when the keel was laid, £20,000 when the vessel was framed, £40,000 when the vessel was plated, £40,000 when vessel was launched and the balance on completion. This was about the hull account. The machinery account payment was to be similarly made by instalments as the work progressed.

No date of delivery was guaranteed but it was anticipated that delivery should be made about the middle of 1921.

The time required for completion was estimated to be about eleven months and the assessee company expected to be able to commence building in August, 1920. Some preliminary work in connection with the contract had been carried out at a cost of £952 when early in 1920, the Steamship Co., Ltd., went into liquidation and the liquidator wrote to the company that he did not want the work of the building of ship to be completed. The assessee company having ordered for the supply of engines and machinery with B. & Co. Ltd., arranged to cancel the contract on payment of £10,000 to them. Assessee company claimed the agreed sum from the Steam Ship Co., and after negotiations, agreed on 17th December, 1920 to accept approximately 2/3rd of the amount originally claimed. The liquidator accepted the offer on 29th December, 1920, subject to confirmation by

shareholders. Ultimately, a sum of £35,000 was agreed upon to be paid by the Steam-ship Company to the assessee company, out of which £10,000 was paid to B. & Co. Ltd., by the Steam-ship Company.

The payment of the balance of £25,000 was, by desire of the assessee company, was deferred till 19th July, 1921. The assessee company contended that the sum of £25,000 was not liable to Excess Profits Duty for the accounting period in question or, alternatively, that it should be apportioned over the several periods during which the work would have been performed and the purchase price earned, had the contract been carried out.

The Commissioners held that the sum was liable to Excess Profits Duty during the accounting period.

On a case being stated in both the cases, it was held by the King's Bench Division in both the cases that the Commissioners' findings were correct in both the cases.

In the first of the case, the Court of Appeal also upheld the above finding.

(1) *Short Bros., Co., Ltd. v. The Commissioner Inland Revenue.*

(2) *The Sunderland Ship Building Co., Ltd., v. The Commissioner Inland Revenue.*

12 T. C. 955 (959, 964, 969, 974, 975)=136 L. T. 689.

PROFITS ASSESSABLE—DATE OF ACCRUAL OF.

Finance Act, 1915 Section 38—Profits from commission not determined till the end of accounting period—Date of accrual—Liability to assessment to Excess Profits Duty.

Assessee company on the business of wool-combers on commission. Prior to June 1917, the wool trade was placed under Government control and the rates of commission were settled between the war office and the Wool Combing Employer's Federation. Assessee were members of Federation. During the accounting periods ending 30th June, 1918, assessee were engaged in combing wool for the Government and were remunerated on the basis of tariff as fixed from 1st June, 1917. The rates were later raised by 10% and again by another 10%.

In July 1919, the assessee got £12,126 as extra of the second enhancement of 10% in respect of work done between 1st January, 1918 and 30th June, 1918.

The sole question was whether the above sum was to be included in the profits of the assessee for the accounting periods of twelve months ending 30th June, 1918, for purposes of assessment to Excess Profits Duty.

Assessee contended that account should be taken of profits, until they became assets that the profits had not arisen during the accounting period and that the assessee's accounts, prepared on commercial basis, should be accepted as basis of liability to Excess Profits Duty.

The Commissioners held that the extra 10% paid a second time, being the final settlement should be included in profits for the accounting periods for Excess Profits Duty purposes. They accordingly raised the assessment. The Commissioners' finding was upheld by the King's Bench Division (per Rowlett J.)

Isaac Holden & Son Ltd. v. The Commissioner Inland Revenue.

12 T.C. 768, (771,773).

PROFITS ASSESSABLE, ISOLATED TRANSACTION.

Finance Act, 1915, Section 38—Excess Profits Duty assessability of profits from single transaction of purchase and sale—Transaction in the nature of trade.

Assessee was a business man with many interests; he lent money, he was connected with film business and dealt also in real property. At one time, he happened to be at Berlin and while there he had an opportunity of making a purchase of a very large quantity of toilette paper from a bankrupt German firm for £ 1,000. He had the paper sent to United Kingdom and in endeavouring to market it, he found a purchaser for the whole quantity at a price of £ 12,000. He was assessed to Excess Profits Duty on the profit of £ 11,000 which thus accrued to him. He contended that the profits made was a capital accretion, the profit of an isolated transaction, and not a part of the assessee's trade.

* The Commissioners held that the profits were from an adventure in the nature of trade and assessable to Excess Profits Duty.

11 T.C. 538 Disting.

Rutledge v. The Commissioner Inland Revenue.

14 T.C. 490 (495,496,497,498)=1929 S. C. 379=1929 S. L. T. 296.

PROFITS ASSESSABLE, REPAYMENT OF EXCESS PROFITS DUTY.

Finance Act, 1915, S.38(3)—Repayment of Excess Profits Duty—Profits assessable in the year in which received.

Assessee carried on business as a metal merchant up to 31st March, 1921. For each of the four years ended 31st December, 1919, he was assessed to Excess Profits Duty. Deduction of this sum was duly made in computing the assessee's liability to income-tax, for each of the four years ended 5th April, 1920.

For the year to 31st December, 1920 assessee made a loss in his business and proved to the satisfaction of the Commissioner Inland Revenue that he was entitled, under Section 38(3) Finance Act, 1915, to the repayment of the whole of Excess Profits Duty paid by him in respect of the previous accounting periods.

The repayment was made to the assessee on the 3rd November 1921. In March, 1921, the business was transferred to a limited company by the assessee.

The assessee admitted having received and held the Excess Profits Duty.

On assessment on this amount of Excess Profits Duty repaid, assessee contended that having ceased to carry on business a valid assessment could not be made upon him, that if at all, a valid assessment could, under R. 4(1) Schedule D, be made under Cases 1 & 11, and not under Case VI, that the sum repaid was not amount profit within Case VI, and that the assessment was invalid also because it had not been made under any particular case.

- The Commissioners held that the assessment could not be

mentioned. On appeal, *held* (relying on 9 T. C. 92 (98, 99, 100)) the Excess Profits Duty returned was assessable to income-tax in the year in which it was received, the same having been treated by the Court (in the above cited case) as being "a special profit of a particular year disentangled from all calculations."

Hill v. Matthews.

10 T. C. 25 (27, 28, 29).

Section 38 (3) and S. 35—Excess Profits Duty repaid—Profits assessable—character and nature of repayment.

Assessee company was registered in 1918 to take over the business of another company, doing the business of skin brokers. The assessee company went into liquidation on the 25th November, 1920 and thereupon ceased to trade. For each of the four years ended 30th April, 1919, the assessee company had been assessed to Excess Profits Duty. The amount was duly deducted for income tax purposes under Section 85, Finance Act, 1915. In the accounting period, 1st May to 25th November, 1920, the assessee company made losses which resulted in its liquidation and having proved to the satisfaction of the Commissioner Inland Revenue that it was entitled under the Finance Act, 1915, Section 38 (3) to repayment of the whole of Excess Profits Duty previously paid by it for the previous accounting period.

Repayment was made to the assessee company on 22nd April, 1924, and assessment to income-tax was made for the year 1924-25, in respect of the sum repaid as being profits. The company contended that it was not assessable under any other case of Schedule D, except Case I, not being annual profits or gain and that under Case I, assessment should be made on the average profits of three preceding years.

Relying upon the case reported in 9 T. C. 92, judgment by agreement was given by the Commissioners against the assessee and the assessment was confirmed. On appeal to the King's Bench Division, the case was not argued, relying on the above cited case and the appeal was dismissed.

On appeal to the Court of Appeal, *held*: the amount of Excess Profits Duty repaid was assessable to income-tax as profits of the year in which it is received. In so deciding and upholding

the finding of the Commissioners and the King's Bench Division, *Lord Hansworth M. R.* observed : "As I have pointed out, this is a case where the company has received payment of an amount previously paid by way of Excess Profits Duty and having that characteristic attaching to it ; and we are told by the Statute that when such a sum is repaid it is to be treated as a profit for the year in which the repayment is received. It is said it may be treated as a profit, but it ought not to be treated as an assessable profit. The answer, to my mind, is that it is paid back not by way of a sum which has no origin or ancestry ; it is a sum which represents a repayment of the amount previously paid by that company in the form of Excess Profits Duty upon their trading. If it is to have that character and is to be treated as such a profit, although it is to be a repayment of sums paid in respect of profit, it is to be treated as a profit for the year in which the repayment is received. The word "treated" indicates that it is to be deemed to be something which in fact it is not, or whether it is so or not it is to be treated as a profit, and, therefore, it is, to my mind, impossible to discuss the question of whether or not difficulties may arise or whether it may be criticised as financially not quite sound that it should be treated in this method in that particular year ; but we are told by the Statute that it is to be treated as a profit for the year in which the repayment is received. When it is repaid treating it as a profit, we find that the company has for some years ceased to trade. Does that prevent it being possible to assess it to Incometax ? If it is treated, as I think it is intended to be treated, as an assessable profit for the year, for the reasons which I have given and for the very purpose for which its repayment has been made, then it is possible to do so, because we have only to look at one or other of the same Rules in which this particular Rule finds its place, and there it is laid down that where a business "has been set up and commenced within the year of assessment, the computation shall be made according to the Rules applicable to Case VI", It cannot be said in the facts of the present case that there is a business which has been going on for three years prior to the time when this repayment was made. It cannot be said that it was commenced within a period of three years and by a process of exclusion we get the fact that here is an assessable profit

received by the liquidator of Nesbitt Limited, which is to be treated as a profit for that year. As to the character and nature of repayment the same *Honourable Lord M. R.* observed: "It comes back, therefore, not having lost its character but being still the repayment of a sum—too much, it is true,—but a sum taken out of the profits which were made by the company in the course of its trading, profits which at the time they were made subject to income tax and to Excess Profits Duty, and that is the character of the repayment that has been made."

Scrutton L. J. Dubitans referring to the case reported as 9 T. C. 92, observed:—

"I am quite satisfied that Parliament never thought of the facts that have given rise to this case, and it is not surprising that I also find it difficult under those circumstances to be sure of what they meant by the language they have used about facts that they did not think about. But I am not sufficiently strongly convinced of the error of that case formally to dissent from the conclusion that my Brothers have arrived at, and I am content myself with remaining in the position of Lord, Sands—*Dubitans*. I am the more satisfied to remain in that position because I do not think the decision of the Scotch Court or of my Brothers will do any particular harm.

A. & W. Nesbitt Ltd. v Mitchell.

11 T. C. 211 (214,217,218,219,220).

S. 38 (3) Repayment of Excess Profits Duty in case of loss—Amount assessable to income tax as profits under Schedule D. Case VI.

Assessees carried on a business of managing a sugar plantation. On 13th August, 1921, the said business was transferred to and taken over by a limited company incorporated in Scotland, and after the above date, the assessees ceased business. Assessees were assessed to and paid Excess Profits Duty for all accounting periods to which that duty was applicable upto and including the accounting period of 12 months ending 30th June, 1912. Deduction of sum paid as Excess Profits Duty was allowed in calculating profits for income tax purposes.

For the accounting period of 12 months ending 30th June 1921 assessee's profits did not reach the point which involved liability to Excess Profits Duty and on or about the 22nd April, 1922, assessee received repayment of a sum of £ 16,242 by way of Excess Profits Duty for previous accounting periods, under Section 38 (3) Finance Act, 1915. On assessment to income-tax on the above sum of £ 16,242 Excess Profits Duty repaid, the appellants contended that they were not so assessable, as they were not carrying on any trade within the year of assessment that the said sum was not annual profit, and that in any event, the effect of Rule 4 (1) of Rules applicable to Cases 1 and 11, Schedule D that the sum so received should be treated as profit of the year in which it was received, and thus should be included in the average of profits or gains on which liability (if any) to tax under Cases 1 and 11, Schedule D would be compiled and that accordingly the sum of £ 16, 242 received on 22nd April, 1922, would not involve liability to tax.

The Commissioners held that repayment of Excess Profits Duty was a profit assessable under Case VI Schedule D and that the form of notice was immaterial so long as the assessment was generally under Schedule D.

On a statement of case, the Court of Sessions upheld the above finding.

9 T.C. 92 foll. 8 T.C. 57 not appl.

Kirke's Trustees. v. The Commissioner Inland Revenue.

11 T. C. 323 (326, 328, 333)=(1927) Sess cas (H. L.) 56 = (1927) Sc. L. T. 53=136 L. T. 582.

Excess Profits Duty—Repayment of—Profit assessable to Income-tax.

Assessee company obtained license to buy milk, from the Food Controller. By virtue of the licenses the company purchased milk in the south west area and the sums payable to the Food Controller under the said licenses for the milk so purchased were debited monthly in the company's trading account under head "purchase", as and when the company received monthly debit notes from the Food Controller the amount so payable and so debited, amounted in the year ended 30th April, 1920 to the sum of £ 8,236.

It was not until April, 1924, that the House of Commons agreed to the omission of the milk charges and following the resolution of the Board of Trade, the said sum of £ 8,286 was repaid to the company in May, 1924.

On assessment on this sum, the company contended that the sum of £8,286 in question was no part of the trading profit of the company for the year ending 30th April, 1920, that the said sum became an asset of the company's trade which was not until after the close of the year 1920.

The Commissioners held that the sum was profit arising to the company in the year ending 30th April, 1920, the year in which the sum recovered had originally been debited in the company's accounts and in which the transaction took place out of which the payment arose.

They accordingly confirmed the assessment. On appeal, the King's Bench Division (per *Rowlatt J.*) upheld the finding of the Commissioners observed that the question involved was one of reopening accounts, the principle of which had already been established.

12 T. C. 768, 12 T. C. 997, & 43 T. L. R. 477 ref.

English Daires Ltd. v. The Commissioner Inland Revenue.

11 T. C. 597, (601, 602, 605, 606.)

PROFITS, ASSESSABLE—REPAYMENT OF E. P. D.

Finance Act. 1921, S. 38. and Finance Act 1915, S. 40—
Repayment of Excess Profits Duty—Assessibility as profits.

Assessee's company got a repayment, resulting from a claim under Section 38, Finance Act, 1921 on the 31st December, 1922.

This sum was credited in the accounts of the company for the year ended on that date, the profits of which were brought into the average for purposes of assessment to income tax. No question, therefore, arose as to this sum. He got another sum as a result of a claim under Section 38, resulting from a revision of the computation of Excess Profits Duty on the basis of half yearly accounting period in lieu of yearly ones over the life time of the duty. A further refund was made as the result of a claim made in respect of the postponement of the renewals and repairs under

the provisions of Section 40 (3) Finance Act, 1915.

Reducing from the above two amounts of £ 50,000 as to the last two items a sum of £ 6,250 as necessary expenses incurred by the company, in the recovery of the above sums, the assesseses were assessed to income-tax on the difference, being £ 43,750.

Repayment of this amount was made in May and November, 1927, and the amount was entered in the accounts of the company for the year ending 30th November, 1927, and was not included in computing the liability for 1928-29. The company contended that the last amount relating to renewal and repairs was not a repayment of Excess Profits Duty and that the sum was the equivalent in duty of repairs a deduction for which was admissible when the Excess Profits Duty was first computed, and that the allowance was then due and the subsequent admission of repairs in its effect upon tax could not be termed a repayment of Excess Profits Duty. The Commissioners confirmed the assessment. On appeal to the King's Bench Division the above finding was upheld (*per Rouclatt L. J.*) with the following observation "when one looks at Section 37 (2) of the Act of 1921 it is to be observed that when, upon the final determination of any modification provisionally applied under Section 40(3), it is found that there is a deficiency or excess it is to be taken into account in computing the excess profits or deficiencies or losses, as the case may be, for the final accounting period."

Olive & Parlington Ltd. v Rose.

14. T. C. 701, (7044, 706.)

Section 36, Finance Act, 1921 and Section 38 (3), Finance Act, 1915—Excess Profits Duty repaid—Profits assessable to income-tax.

Assessee carried on business of a builder and contractor. His profits were assessable to Excess Profits Duty.

The Excess Profits Duty payable for the accounting period of 12 months, 31st December, 1918 and 31st December, 1919 was £52,683 and £4,397 respectively. Only £2,000 cash, however, was paid in respect of these sums, the remainder being allowed to stand over as an amount due to the Revenue. The

deficiency in duty estimated in accordance with the provisions of Section 88 (3) Finance Act 1915, in respect of the accounting period 12 months to 31st December, 1920, was £49,866 while in addition further relief was admitted by the Revenue under the provision of Section 36, Finance Act, 1921 being an adjustment of Excess Profits Duty over the aggregate period of the charge. Finally, after adjustment of sums due to revenue authorities and the sums due to be repaid to the assessee, a sum of £3,110 was paid in cash to the assessee in July, 1923 the sum having been agreed between the parties.

The assessee contended that the sum actually repaid *i. e.* £3,110 only was profit for purpose of income-tax assessment.

Held: the entire amount set off (being £55,070) was, repayment and as such the profits of the assessee for income-tax purposes) the payment being a payment at Common Law.

8 Ch. App. 407 (414) *ref.*

Tarrant v. Roberts H. M. Inspector of tax.

15 T. C. 754 (756, 759, 769)=47 T. L. R. 199.

PROFITS—COMPUTATION OF.

Finance Act, 2 of 1915 Section, 38 (3)—Reopening of computation of Excess Profits and adjustment of actual loss.

Assessee carried on the business of exporting cloth to the Far East. During the years 1918, 1919 and 1920 assessee sold large quantity of goods to the National Mercantile Corporation, which carried on business at Shanghai. The course of assessee's business was this. Goods sold by the assessee were shipped to Shanghai. Assessee draw a bill at four month's sight on the corporation for the invoice price of each shipment of goods. Each bill carried interest @ 7% per annum from its date to the approximate date of the arrival of remittance in London. Each bill, as it was drawn, was sent with the relative shipping documents to the Mercantile Bank of India in London and the assessee obtained from the Bank a temporary advance equal to the amount of the bill. The Bank

then sent the bill and documents to Shanghai branch for obtaining the corporation's acceptance. The Shanghai branch of the Bank took delivery of the goods which was kept in its own warehouse as security till the bill was paid.

The goods were then handed over to the corporation and the advance made by the Bank to the assessee was satisfied in the ordinary course out of the proceeds of the bill. Assessee remained liable to the Bank for the amount of advance if in any case the amount of bill was not received.

In 1920, the market in the East broke and the Exchange suffered great depreciation and as a consequence traders got in difficulties. The result was that the corporation was unable to meet its acceptances. From January, 1920 onwards, there was at all times a large sum owing on the bills which the corporation was unable to meet—the amount outstanding on 28th October, 1920, being £47, 982.

In the course of 1921, goods in the Bank's warehouse were sold and proceeds taken in part satisfaction of the amount advanced to the assessee. After giving credit for these sums, there was a net claim of the Bank against the assessee amounting to £22, 410. This was paid and settled at £8,000 in December, 1922 by the Bank cumbering the assessee's financially distressed position. For the assessee's the full sum of £22, 410 was shown as the bank's claim which was allowed as a deduction. Later, when it was discovered that a settlement was arrived at £8,000, additional assessment was made on the balance of £14,410.

The appellant contended that the liability related to the year ending 31st March, 1921 and that the fact of the Bank having given accommodation for a part of the liability later on was immaterial for the purposes of computation of his liability.

The Commissioners upheld the assessment. The finding was upheld by the King's Bench Division also in appeal. On appeal, the Court of Appeal also upheld the finding, observing that the sum of £22,410 was nothing more than an *interim*

determination of the liability which could be reversed later as it was indeed done.

12 T. C. 927 & 12 T. C. 768 not appl.

Bernhard v. The Commissioner Inland Revenue

13 T. C. 723 (728, 736, 741, 745, 746).

Excess Profits Duty—Computation of—Payment of sums by employers to secure annuities—Payment of pension equal in amount to annuity to pensioners—Sums paid not deductible.

Assessee company was incorporated in June, 1930, in pursuance of a scheme, whereby the said company acquired and took over all the business, assets and liabilities of another limited company. For the purposes of taxation the assessee company was treated as the successor to the old company.

The predecessors of the old company had set up a scheme under which pensions were paid to its employees who had retired or become incapacitated, reserving the uncontrolled discretion to vary or cease payment of such pensions. In or about the year 1918, or early in 1919, the board of directors of the old company decided to purchase on its behalf annuities on the lives of those persons who had been granted or were receiving pensions under the said pension scheme. The company accordingly entered into negotiations with the Equitable Life Assurance Society for the purchase from that society of annuities payable during the lives of the serving persons who were receiving pensions of amounts equal to their respective pensions. As a result of the negotiations, a policy was, on 5th day of March, 1919 issued by the Equitable Life Assurance Society under which the latter undertook, in consideration of a sum of £ 23,100 paid to it by the old company, to pay to the old company during the remainder of the life of the each pensioners annuities of the respective amounts by quarterly instalments, the first of which was to fall due on 15th April, 1919. The said policy was dated as 31st December, 1918 and the annuities payable under it were payable from 1-1-1919. The said policy was cancelled as to certain annuities in 1924

and the old company received £ 7,000 in consideration of this cancellation. The pensioners did not at any time know of the existence of the policy, nor were they consulted as to this cancellation. The amount undertaken in pursuance of the said policy to be paid by the society to the old company during the remainder of the life of each pensioner was equal in amount to the pension which was being paid by the old company to the pensioner.

The company claimed to deduct the sum of £ 23,100 from the profits in computing the deficiency for the purposes of Excess Profits Duty for said accounting period.

The Commissioners held that the sum of £ 23,100 was wholly and exclusively laid out or expended for the purposes of the old company's trade but that it constituted capital expenditure and was prohibited as a deduction from the profits in arriving at the computation under R. 3(f) of the Rules applicable to Cases I & II Schedule D. They further held that the transaction in question was not one which would artificially reduce the amount of profits of the trade of the appellant company within the meaning of Finance Act 2 of 1915 Schedule 1V Para 5. The finding of the Commissioner was upheld in appeal by the King's Bench Division.

7 T.C. 358 ref.

Morgan Crucible Co., Ltd. v. The Commissioner Inland Revenue.

17 T.C. 311(315,317)=(1932) 2 K.B. 185=101 L.J.K.B. 764=147 L.T. 174.

Finance Act, 1918—Section 35—Computation of Excess Profits Duty—Date of sale of stock in trade.

Assessee carried on the business of brewers and maltsters, wine and spirit merchants at Windsor. By a letter dated 11th April, 1918, the Solicitors of a limited firm made an offer to the assessee company for the purchase of their assets etc., at a certain specified price. Assets of any description, except wine and spirit stock, was to be included, the latter to be sold at a valuation. On the 12th April, 1918, the managing directors of the assessee assured the above letter by a letter on the 17th May, 1918, a contract made between the assessee

company and the offering company was executed. The contract provided that the purchaser company shall also take and pay in cash at valuation to be made as on 24th June, 1918 and all the wine and spirit stock of the vendor company, Completion under the contract for sale took place on 24th, June, 1918 and the actual sum payable for wine, spirit etc., ascertained by valuation on 24th January, 1918 was paid shortly afterwards.

Negotiations had been pending between the assessee company and the purchasing company for several months prior to the exchange of the letters above referred to and parties had practically agreed as to the terms for some time previous to the exchange of these letters. The quantity and quality of the stock held by the assessee company was well known at the time the letters were written. Assessee company carried on its business as usual upto 24th June, 1918 and as per terms of the contract of 17th May, 1918, were entitled to and received the profits of the business accruing to that date.

Assessment to Excess Profits Duty was made on the assessee company in respect of the profits of the business for the accounting period ended on that date. In arriving at these profits two sums of £ 589 and £41,103 were included under Section 35(1), Finance Act, 1918 as receipts of business. These were paid by the purchasing company for brewery stock and wine and spirit stock respectively sold under the contract. The point in the case was whether the sale of the stock took place after 22nd April, 1918. The assesseees contended that the sale took place before 22nd April, 1918, having been effected by the above-mentioned letters of 11th and 12 April, 1918.

The Commissioners Inland Revenue contended that the said sum of £41,103 was rightly included in the computation of profits and that the sale did not take place till the 24th June, 1918. The Commissioner upheld the above contention of the Inland Commissioners and confirmed the assessment.

The above finding was upheld by the Revenue Judge (*Sankey J.*) in King's Bench Division. It was observed that the two letters of 11th and 12th April, 1918 did not constitute

a concluded agreement for sale and that the sale did not take place before the 22nd April, 1918 it being immaterial to decide whether it took place on 17th May, the date of formal contract or 24th June, the date of passing of part of sale money for stock.

(1921) 3 K. B. 152 ref.

Nevil Reid & Co. Ltd., v. The Commissioner Inland Revenue.
12 T. C. 545 (548,571,572).

PROFITS.—COMPUTATION OF SET OFF—APPLICABILITY.

Finance Act, 1915, Sections—38 & 40 Business of ship brokers, on own account and jointly as partner—Businesses separate for Excess Profits Duty purposes—Set-off inapplicable.

Assessee, company, carried on business as ship-brokers on their own accounts and also as agents. The were also partners in other ship-broking firms. For Excess Profits Duty the profits arising from the company's business of ship-brokers etc. in each accounting period from 1914 to 1920 were computed separately and in those accounting periods when the results showed an excess of profits over the pre-war standard and allowance assessments were made upon the company.

Similarly the profits arising from firms in which the assesses were partners in the said accounting periods 1914-1920 were computed separately. As regards these assessments, the company have always reserved the right to claim that the business of the company and their share of the joint steamers is one and the same business in dealing with any liability for Excess Profits Duty.

The Commissioners Inland Revenue, purporting to act, by way of concessions only, have allowed the deficiencies incurred in the company's business as ship-brokers etc. to be set off against Excess Profits Duty payable by the company in respect of their shares of the profits in the joint business, in co-terminus accounting periods.

The Commissioners of Inland Revenue in accordance with the alleged concession, allowed the company to set off a certain amount of their deficiency but refused to allow further deficiency to be set off.

The company contended that it carried on only one business and that their share in profits of joint business was profit of the companies in which they held shares and that set off was possible and under term of Part 111, Finance Act, 1915, businesses could not be treated as separate.

The Commissioners held that the company's own and joint businesses were separate and that no set off could be allowed.

The above finding was upheld by the King's Bench Division and the Court of Appeal. The Court of Appeal observed that set off in Excess Profits Duty cases was not possible like income-tax, the nature of charge in the two cases being different.

1925 Sc. 144 & 10 T. C. 88 (112) & 4 T. C. 265 (301) ref.

Birt, Potter & Hughes, Ltd. v. The Commissioner Inland Revenue.

12 T. C. 976 (984,985,986,992,997).

PROFITS—DATE OF ACCRUAL

Finance Act, 1915, Section 38—profits of trade or business—date of accrual.

Assessee company carried on the business of brewers and wine and spirit merchants. In the course of this business, the company imported rum and sold it either in retail through public houses managed by itself or wholesale to tied public houses and free customers.

On the 6th October, 1917, the Admiralty issued an order under Regulation 2 B of the Defence of the Realm Regulation, issued under the Defence of the Realm Act, 1914, giving notice of their intention to take possession of all stocks of rum in bonded ware-houses in the United Kingdom. On 16th October, 1917, the assessee company made a return of all the rum in its bonded ware-houses, which amounted to 700 puncheons (a puncheon being equal to 150 proof gallons). In November, 1917, gave notice that they decided to take provisionally part of the rum only 230 puncheons being some 2/7th of company's stock and that it was decided for the present to pay the actual purchase-price, plus incidental charges, carriage, rent and interest at 5% up to 31st then next, further amount as to further

payment to be made later on.

The managing director of the assessee company stated that the above action of the Admiralty had injured the company's stock seriously and had upset their business for some years on.

The assessee company was paid by the Admiralty a sum of £10,315-1-4 which was payable into account by the company under head "Sale of Rum" This sum was included in the profits of the company for Excess Profits Duty purposes for 12 months ending 30th October 1918.

A dispute, however, arose between the Admiralty and the company over the said rum, and on 7th October, 1920, the company presented a claim to the War Compensation Court, claiming £ 28,571 as compensation, less the above mentioned amount received on account. The said Court adjudged the right sum to be awarded to the company to be £15,624-11-1½ as compensation, credit being given for the sum already paid. The balance was paid by the Admiralty to the company in January, 1922.

The company contended that this last mentioned balance was not a receipt of their profit. The Commissioners discharged the assessment. On appeal, however, the King's Bench, Division reversed the Commissioner's finding which was upheld by the Court of Appeal and the House of Lords also.

The Commissioner Inland Revenue v. The New Castle Breweries Ltd.

12 T. C. 927 (934, 939, 945, 951, 954, 955). = 95 L.J.K.B. 936 = 96 L.J.K.B. 735 = 42 T.L.R. 185 = 42 T.L.R. 609 = 43 T.L.R. 476 = 134 L.T. 506 = 137 L.T. 126.

Excess Profits Dutys—Claim for damages for breach of contract—Payment made by agreement, whether profits—Date of accrual.

Assessee company carried on business as worsted spinners. Their last accounting period was the one ending 30th June, 1921. By a contract dated the 30th March, 1920, assessee sold to Messrs. Taylor & Co, 15,000 lbs. of yarns at 20s. 6 d. per lbs. On 29th June, 1921, assessee agreed to cancel the said contract and to substitute therefor a new contract of sale of the same quantity of yarn at 18s. per lbs. upon payment

by Taylor, & Co., £1,875 of the difference due to reduced rate. Messrs. Taylor, & Co, paid the said sum to the assesseees in two instalments of £500 on 27th January, 1921 and £ 1,875 on 16th August, 1921.

In computing the profits of the assesseees' trade for the accounting period 30th June, 1920 the Commissioners Inland Revenue treated the whole of the said sum of £18,75 as trading receipt of the period.

On two other contracts with F. Shirley Ltd. and A. W. Wood and Co. assessee got £200 and £12,500 respectively which sums were also treated as their trading receipt for the said period.

Assessee contended that the same were not trading receipts, at any rate not of the periods ending 30th June 1920 and 1921 in the case of the sum of £1,875 and £200 respectively and that the sum of £12,500 was for damages for breach of contract.

The Commissioners held the £1875 to be trading receipt for the period ending 30th June, 1920 and the two sums of £200 and £12,500 as the trading receipts for the accounting period ending 30th June 1921.

The finding was upheld by the King's Bench Division.

(Per Rowlatt J.)

Jesse Robinson & Sons v. The Commissioner Inland Revenue

12 T. C. 1241 (1246, 1247).

PROFITS - FORWARD CONTRACTS.

Finance Act, 1915, Section 38—Forward Contract—Date of accrual of profits.

Assessee company carried on business as Electrical and Mechanical Engineer.

On 24th March, 1914, the company entered into a contract for the supply of 55 electric motor cars, complete with control gear, delivery of which was to commence on 1st July, 1914 and was to terminate on 3rd September, 1914. The company itself manufactured motors, but it sub-contracted the control gear to another company to "Test", by a contract dated the 3rd April,

1914. The resultant profit to the assessee company under the sub-contract was to be £1,064. Owing to war, deliveries under the contract were delayed. For the six months ending 31st December, 1914, only £ 628 selling value of control gear was delivered, with a profit of £ 85. For the six months ended 3rd June, 1915, and £1766 selling value was delivered, with a profit of £224 for the six months ended 31st December, 1915, further delivery were made with a profit of £184 and the final delivery took place in July, 1916, with a profit of £ 570. The profits were credited to the several periods (all of them accounting periods) in which deliveries were affected. The assessee company contended that the profit on the transaction in question was ascertained and made on the completion of the contract for the purchase and sale, *i.e.* on 3rd April, 1914, that the said profits resulted from pre-war contract and did not form part of the company's profits and gains of the various accounting periods in which delivery took place and that the way in which the company's accounts had been drawn up could not bind the company for taxation purposes.

The Commissioners disallowed the company's contention. On appeal, the King's Bench Division (per *Rowlatt J.*) reversed the Commissioner's findings and allowing the appeal, remanded the case. The Court of Appeal reversed the order of the King's Bench Division, on appeal and restored the Commissioner's finding. It was observed that the profits were neither ascertained nor made, at the time that these contracts were concluded and that the only proper way in which the profits arising from the working up of this contract ought to be brought into account was to ascertain them as and when they were realized.

J. P. Hall & Co., Ltd. v. The Commissioner Inland Revenue.

12 T. C. 382 (386, 387, 388, 389, 390)=(1921) 1 K.B. 213
 =(1921) 3 K. B. 152=90 L. J. K. B 1229=125 J. T. 720=87
 T.L.R. 714

STATUTORY PERCENTAGE

**Finance Act 1916, Section 49 (1) Proceedings under—
 Remuneration of directors of company having control-
 ling Interest—Deduction of—Statutory percentage of
 average of capital taken to be pre-war standard—Finance
 Act 1915, Schedule IV, Part II, R. 4.**

Assessee company was incorporated in 1914. As such it

had no pre-war standard for purposes of Excess Profits Duty and consequently its pre-war standard had to be taken to be the statutory percentage on the average amount of capital employed in the business during the accounting period, as provided by Finance Act, 1915, Schedule IV, Part II R. 4.

The directors of the company held 4,300 shares out of a total number of 7,000 shares. They thus had a controlling interest and proceedings were taken under Section 49 (1) and the company was treated as a firm and the directors as partners thereof. It was contended on company's behalf that the directors did not have a controlling interest in the company and that consequently their fee and salaries should be allowed as deduction in computing Excess Profits Duty.

The Commissioners held that the directors of the company possessed a controlling interest and that consequently the Commissioner Inland Revenue could treat the company as a firm and the directors as partners thereof. They accordingly dismissed the appeal and confirmed the assessment.

A case having, thereupon, been stated to the Court of Sessions, the Court upheld the above finding.

The Glasgow Expanded Metal Co. Ltd. v. The Commissioner Inland Revenue.

12. T C. 573, (578, 580)=(1923) Sess Cas 365.

TRADE OR BUSINESS.

Finance Act, 1915, Schedule IV, Part 1, Rs. 8 & Section 38—Business of making investments—Trade or business—Chargeable to Excess Profits Duty.

Assessee company was formed in 1917 to acquire, hold and guarantee the subscription of shares, stocks, debentures, debenture stocks, bonds, obligations and securities, issued by any company constituted or carrying on business in United Kingdom or in any colony, dependently and also those issued by any government or sovereign and to purchase and deal with real and personal property and rights of all kind.

The assessee company held the whole of the share capital of a Japanese company, purchased in 1917, the whole of

the common stock of Canadian company a holding of £ 550,000 in the Victory Loan, purchased in 1919, and a holding of preference shares in Amalgamated Cotton Trusts.

The Chairman, the Managing Director and other directors of the assessee company hold large shares in the company. A majority of the meetings of the company was held for the purpose of passing transfer of shares in the assessee company.

The company contended that it exercised no control, other than that of a shareholder over the Japanese and Canadian companies in which it held shares, that it was a holding company and stood in the same position as an individual acquiring and holding investments and that it did not carry any trade or business and was thus not within the charge to Excess Profits Duty.

The Crown contended that the principal business of the company was to making investments that the respondent company was carrying on trade or business within Section 28(1) and that its profits were chargeable to Excess Profits Duty. The Commissioners were of opinion that the Company was a holding company only, not carrying on any trade or business. They accordingly discharged the assessment. On appeal, the King's Bench Division reversed the above finding, holding that the company's business was that of investment and thus its profits were within the charge of Excess Profits Duty.

The Commissioner Inland Revenue v. The Tyre Investment Trust Ltd.

12 T. C. 646 (654, 655, 656)=132 L T. 59.

Ss. 39 and 40 (2)—Port of London Authority carrying on trade — Assessable to Excess Profits Duty—Standard o charge.

Assessee, Port of London Authority, are the authority appointed by the Port of London Act, 1908. Under the said Act, assesses were entrusted with certain duties for improving and administrating the London Port, which duties they have been discharging. They have, for the said purposes

taken over and carried the undertakings of the Dock Companies, have exercised the powers conferred on them of purchasing their main undertaking affording facilities for the loading, unloading or ware-housing of goods in the Port of London by acquiring with the consent of the Board of Trade and carrying on the business of two companies, the one being the business of discharging and loading grains and other goods and the other of constructing granaries, cranes, and ware-houses. They were in fact owners of docks and of lands, buildings, railways and other works *e.g.* ware-houses, hotels and other properties.

Their revenue was derived from dues and rent on shipping and rates and charges for accommodation and services rendered and they also received income from ware-housing goods and from rents of properties, railway rates and tolls, dredging licenses, river tolls, hire of dredging plant, canal tolls and fees for the registration, and licensing of craft and watermen and receipts from various other sources.

On their profits derived from the businesses transferred to them for Dock Companies, etc., or subsequently acquired or purchased by them, they were assessed to Excess Profits Duty upon the basis of pre-war standard of profits. The assessee, on appeal, contended that they were not a body carrying on a trade or business within the meaning of Part, III, Finance Act, 1915, that they did not and owing to their constitution could not make any profit and that any surplus accruing to them in their revenue account was purely of a temporary and accidental nature and was not profit assessable.

The Commissioner determined that the London Port Authority, the assessee, were carrying on trade or business within the meaning of Finance Act, 1915, Part III and made profit in so doing, within the meaning of that Act. On appeal, *held*: (by the High Court) the assessee did carry on trade or business and that they were rightly assessed as above. The finding was upheld by the Court of Appeal also.

(1919) 2 K.B. 650 & 2 T.C. 25 ref.

The Port of London Authority. v. The Commissioner Inland Revenue.

12 T.O. 122 (132,134)=(1919) 2 K. B. 603=(1920)2 K. B. 612=89 L. J. K. B. 547=123 L. T. 316=36 T. L. R. 460.

S. 38—Receipt of royalty by a company for sale of patents—Not a trade or business.

Assessee was a company incorporated under the Acts relating to limited companies. By an agreement, the company agreed to take over and work certain inventions on payment of royalty. Later, a new company was formed, the former company having been wound up. The liquidators of the old company agreed under an agreement to transfer all the old company's rights and assets to the new company in consideration of £ 30,000 in cash, £ 80,000 in fully paid up shares and a royalty of 50 per effective horse power on every machine sold.

Under the agreement as above-mentioned, large sums became payable to the liquidators and it was found inconvenient for the old company to continue in liquidation. By an order obtained on 15th June, 1900 the winding up of the old company was stayed and since that date the said company has continued as a company to receive the sums to which it was entitled and to make distribution to its shareholders.

The above agreement was later modified by subsequent agreements in 1901, 1904 and 1915, entered into between the two companies and Mr. P whose inventions the old company had undertaken to work.

No part of the expenses of the new company in connection with the experimental work on the patents was charged to or borne by the old company, which had no separate office or staff and the new company did the Secretariat work required by the old company for calling directors or shareholders' meetings and the payment of dividends.

It was contended on behalf of the old company that it was not carrying on any trade or business within the meaning of the Finance Act, 1915, Part III, and that it was not liable to Excess Profits Duty assessment. The special Commissioner determined on facts and evidence that no trade or business within

the meaning of Finance Act 1915, Part III was carried on by the old company.

The finding of the Commissioners was upheld in appeal by the King's Bench Division (per *Rowlatt J.*) it being held that the royalties were in effect payment by instalments of part of the price of the property which the old company had disposed of to the new company and that the right to the royalties being practically the only interest in the undertaking that the old company retained, it had nothing to do but simply to receive the royalties.

As such, it was held that the old company carried on no trade or business within the meaning of Finance Act 1915 and was assessable to Excess Profits Duty.

The Commissioner Inland Revenue v. The Marine Steam Tarbin Co. Ltd.

12 T. C. 174 (178, 180=(1920) 1 K. B. 193=89 L. J. K. B. 49=121 L. T. 368=35 T. L. R. 593.

Finance Act, 1915, Sections 38 & 39—Syndicate formed to acquire concessions and rights—Profits of syndicate—assessment to Excess Profits Duty.

Assessee, syndicate was a company incorporated on the 10th January, 1905, under the Companies Act. It was formed to apply for purchase or otherwise acquire concessions, rights and privileges of every kind in relation to mining, electrical, agricultural land, and water in the control of works of any kind in Korea or elsewhere and to work, exploit and turn the same to account.

The business of the company was to be managed by directors who were to exercise all powers of the company and do on behalf of the company, all such acts as were within the scope of the Memorandum and Articles of Association of the company.

The Syndicate acquired in February, 1905 a half right to concession in Korea extending over 216 square miles on which was situate a gold mine. The title to this concession was granted by the Korean Government and was held jointly with an American firm of Collbran and Bostwick under an

agreement dated the 7th February, 1905. It was originally intended that the Syndicate should itself develop and work the concession and should also obtain and develop other concessions for which preliminary negotiations had been made. These expectations, however, were not fulfilled and on the 2nd March, 1908, the Syndicate executed a lease of their share in the concession to the American company. During the year ending 31st March, 1916 and 31st March, 1917 the income of the Syndicate had been derived solely from the interest on bank deposit and from royalties received under the lease.

The Syndicate employed as its agent a resident in Korea at a small retaining fee of some £ 25 per annum.

The Syndicate was assessed to Excess Profits Duty on the above profits. It was contended on behalf of the Syndicate that it was not carrying on any trade or business within the meaning of Finance Act, 1915, Section 39. The Commissioners allowed the appeal and discharged the assessment, holding that the company was not carrying on any business, the receipt of interest and royalties alone which the company had been doing, not being a business.

The above finding was upheld by the King's Bench Division (per *Rowlatt J.*) The finding was reversed by the Court of Appeal. In appeal, it was held that the effect of the agreement between the assessee and the American company was the carrying out of the object which they undertook to attain, i.e. of acquiring a concession and working, exploiting or turning the same to account, that in such a case Section 39 has to be read with the changing Section 38 and that the purpose of acquiring concessions and turning them to account was a 'business' as contemplated and spoken in Section 39 of the Finance Act, 1915.

The Commissioner Inland Revenue. v. The Korean Syndicate Ltd.

12 T. C. 181 (186, 197, 198, 201, 202, 205, 208)=(1920)
 1 K. B. 593=(1921) 3 K. B. 258=89 L. J. K. B. 779=90 L. J.
 K. B. 1153=122 L. T. 371=125 L. T. 615=36 T. L. R. 179=
 37 T. L. R. 785.

TRADE OR BUSINESS

Ss. 38 and 39 Income of inventor from receipt of Royalties—Not profits assessable to Excess Profits Duty.

Assessee had for many years been an inventor and had applied for and been granted a large number of patents, in all amounting to rather under 400. Of these, he had only sold one, twenty five years ago. He did not himself manufacture the patented articles.

Assessee had for some time past been the managing director of a company, manufacturing and dealing *inter alia* in cycles and cycles parts and accessories. On 15th February 1907, the respondent entered into two agreements with the above mentioned company. One of the agreements provided that assessee should continue to hold the office of the managing director for a further period of five years from the date of execution of the above agreement on the terms therein set out, receiving a salary of £ 800 per annum and commission dependent on results. The other agreement provided that on the terms and with the limitations therein expressed, the company should have the right to elect to be interested in and entitled to a share in any discovery, invention or design made by the assessee while in the employment of the said company.

Assessee was the director of another company. From the latter company it received royalties. The question was whether the receipts of these royalties were receipts from trade or business within Section 39 Finance Act 1915. There was a difference of opinion amongst the Commissioners, one holding that while profits from royalties were not profits arising from trade or business, within section 38 (1) Finance Act 2, of 1915, in this particular case, as the facts showed that the respondent had made it the business of his life to discover and invent means whereby profits could be realized in the course of trade and to take active part in the supervision, management and control of the manufacturing and trading operations necessary to such realizations, the profits accrued to the assessee from a business within the meaning

of those words as used in Section 38 (1) and that, therefore, he was not within the exemption in Section 39 (c) Finance Act, 1915. The other Commissioner, however, took the contention put by the assessee as correct. The Commissioners' determination was in favour of the assessee and they discharged the assessment.

The above finding of the Commissioners, that the assessee was not carrying on a business, the profits of which were liable to Excess Profits Duty, was upheld by the King's Bench Division in appeal.

The Commissioner Inland Revenue. v. Sangster.

12 T. C. 209 (213, 214, 216, 217)=(1920) 1 K. B. 587 = 89 L. J. K. B. 673=122 L. T. 374=36 T. L. R. 158.

TRADE OR BUSINESS CARRYING ON OF.

Section 38—Carrying on of trade or business.

A tramway company (called the Old Company) sold the whole of its undertakings, with the exception of some lands to another Tramway company, (Anglo-Argentine) in consideration of an annual sum of £70,000 to represent the payment over 80 years of the capital sum treated as the price of the undertaking and interest, year by year, on the unpaid portion. By an arrangement, a New Company superseded the Old Company. The right to receive the above mentioned sum of £ 70,000 a year was assigned to the New Company. The Old Company handed a further sum of £111, 500 to the New Company. Lands excepted from sale to Anglo Argentine Co., also were assigned to the New Company. The New Company in return for the extinguishment of the debentures of the Old Company issued debentures of its own to the face value of 50% in excess of the face value of old debentures, being a lower rate of interest, so that the income was the same. It also issued shares, extinguishing old shares, the new shares being greater in total face value than the old. Under an agreement between the Old and the New Company, the debenture stock of the New Company was to be redeemed at par in 1985 (the termination of the annual payments of £70,000 year). This latter sum was to be held under special trust to pay the interest of debentures yearly, administration expenses and dividend. The

income of the farm was to be accumulated to form a fund, which would be the equivalent of the share capital at the end of the time.

In the above circumstances, it was contended that the New Company did not carry on business or trade. It was held that the New Company was carrying on trade or business.

The Commissioner Inland Revenue v. City of Buenos Ayres Tramway Co., (1904) Ltd.

12 T. C. 1125 1125, 1142.)

Finance Act, 1915—Section 38, Carrying on of trade or business.

Assessee company in this case was formed to acquire steamships and other vessels, to build, charter and let out on hire and trade with ships, to carry on business as shipowner and to invest and deal with company's money not required for any immediate purposes.

The company held certain treasury Bills. It was held by the King's Bench Division (per *Rowlatt J.*) that the Company did carry on trade or business.

12 T. C. 657

(South Bihar Ry. case) ref.

The Commissioner Inland Revenue v. Dale Steamship Co. Ltd.

*12 T. C. 712 (718—720.)

Finance Act, 1915, Section 38—Carrying on trade or business—company formed to construct a railway—fixed annual rent, transfer fees, interest and dividends, receipt of company.

Assessee company in this case was formed to construct a railway in Scotland. It was incorporated by an Act. The company was, under the Act, to receive 4% on the amount spent on construction of the railway, together with a further

* This was also a case under Section 52, Finance Act, 1920, relating to Corporation Profits Tax. It has also been noted briefly here for reasons similar to that given under the Westleigh. The South Bihar Railway and the Eccentric Club Ltd.

12 T. C. 657).

fluctuating and contingent rent dependent on receipts from the railway. By an amending Act, passed later, a fixed rent of £ 12,500 was to be paid to the assessee company, free and clear of all deductions except income-tax.

Apart from this, the sole revenue of the company consisted of a small amount of interest on cash at its bankers, of dividends on investments and a trifling amount received by way of transfer fee on the transfer of company's shares.

The company was scheduled as a "Railway company," under the Railway Act, 1921.

On the company contending that it did not carry on any trade or business, it was held that the company was carrying on trade or business.

* 12 T. C. 657 ref.

Finance Act, 1915—S. 38 carrying on of trade or business.

Where a company, formed to acquire interests in free hold estate, held investments, had power to exchange any of its investments and deal with the mines of the company the revenue of the company consisting of rents from leases, it was held by the Court of Appeal that the company carried on trade or business.

12 T. C. 181 (197) ref.

The Commissioner Inland Revenue v. The Westleigh Estate Co., Ltd.

12 T. C. 657 (687, 693, 698)=(1923) 2 K. B. 514=(1924) 1 K. B. 390=1925 A. C. 476=92 L. J. K. B. 990=93 L. J. K. B. 289=94 L. J. K. B. 386=155 L. T. J. 387=130 L. T. 538=132 L. T. 802=39 T. L. R. 461=40 T. L. R. 308=41 T. L. R. 328.

Finance Act, 1915, S. 38—Carrying on of trade or business.

Assessee company was formed to supply to the Secretary of State for India in Council, funds and materials required for the construction, completion and making ready and fit for public traffic a railway. Its receipts were derived from annual payments made by the Secretary of State. It was concerned in the business of disposing and dividing profits.

* The case related to corporation profits but as the point involved was one of "carrying on trade or business" also, which is necessary for the determination of Excess Profits Duty assessment, it has been noted briefly here.

It was held by the Court of Appeal that the company carried on trade or business. The finding was upheld by the House of Lords also.

The Commissioner Inland Revenue v. The South Bihar Railway Co., Ltd.

657 (689, 694, 695, 698, 702, 712).

Finance Act, 1915, S. 38—Carrying on of trade or business.

In this case the company in question was a social club. The income and property of the club was to be applied towards the promotion of the objects of the club and no member of the club in his character as such was entitled to receive directly or indirectly any dividend, bonus or other profit out of such income or property. It was held by the Court of Appeal that the company did not carry on trade or business.

2 T.C. 100, & 2 T. C. 461 (482,483) ref.

The Commissioner Inland Revenue v. The Eccentric Club Ltd.

* 12 T. C. 657 (691, 697, 703, 704).

Finance Act, 1915, Sections 38 & 39—Carrying on of trade or business for Excess Profits Duty purposes—Company assigning rights and receiving royalty—Liability to Excess Profits Duty.

Assessee company, incorporated in 1912, acquired certain properties and rights to bore for oil in Budderpore, Assam. The company proceeded to drill wells for oil on some of the properties and lands, the subject of the said rights and erected certain buildings and plants thereon in connection with the said drillings.

By an agreement dated the 8th April, 1915, made between the assessee company and the Burma Oil Co., Ltd., the assessee company transferred the rights to bore oil, in consideration of payment of royalty and a fixed sum as expenditure of the assessee company up to 31st March, 1915. The Burmah Oil Company

* These three cases occurred under Section 52, Finance Act, 1920 for the purposes, not of Excess Profits Duty, but of Corporation Profits Tax as they touched and decided the question of "carrying on trade or business". also useful and necessary to be looked into for the purposes of Excess Profits Duty assessment, they have been noted briefly here also.

was to render account of the production of petroleum and of the quantity of fuel used and the royalty due, every month, to the assessee company. The said company was not either to mortgage or assign the rights so sublet to them under the above-mentioned agreement. The Burmah Oil Company duly acted on the agreement and paid the sum of £ 12,500 expenditure as therein provided. The royalties payable under the said agreement were also duly paid to the assessee company's agent at Calcutta.

Assessee company employed a resident representative to check the quantities of oil produced by the Burmah Oil Company and to forward a monthly statement to the company in London and did from time to time distribute by way of dividend the balance of the royalties payable after defraying therefrom the above cost of checking. The company contended that as from 8th April 1915 the date of agreement, it ceased to carry on trade or business for Excess Profits Duty purposes. The Commissioners found as a fact on evidence that the company was not carrying on trade or business within Section 38 Finance Act, 1915 and they accordingly discharged the assessment.

On a case being stated, the King's Bench Division (per *Rowlatt J.*) held that the Commissioners' finding was, on the facts above-stated erroneous in law, that the question was one of fact only and that, under the agreement of 1915, the assessee company had not transferred the whole of their property, as they had imposed upon them certain delegations left in respect of the property and certain rights, of getting the property back again if the Burmah Oil Company did not carry out their agreement.
12 T.C. 181 ref. & rel.

The Commissioner Inland Revenue. v. The Budderpore Oil Co. Ltd.

12 T.C. 467 (473, 477, 480, 481.)

Finance Act, 1915, Section 38—Finance Act, 1918, S. 35—Profits of trade of a party intending to retire from business—Assessability to Excess Profits Duty.

Assessee had carried on business as wine and spirit merchants in Belfast for a number of years. Early in 1916 they decided to retire from business. This decision they communicated to their customers in a circular dated the 19th

March, 1916. On the 24th March, 1916, they also issued to their customers a circular setting out the amount and nature of goods which they had for sale and in this circular they specifically stated that they were retiring from business.

It was found as a fact that the assesseees did not want to sell their business as a going concern but that they wanted to dispose of their stock to their regular customers.

In 1916, there was not much demand for their stock but in 1917 they were practically able to dispose of their entire stock, realizing thereby a sum of £ 48,402-18-1. They purchased no stock after they had decided to retire except that they made some purchases to meet running contracts with some distillers to take certain amount of spirit in each year up to 1917. At the close of 1917 they still had stock in hand amounting to £ 1,020 in value.

There was no purchase of stock in 1918.

On a return for assessment to Excess Profits Duty made by the assesseees on 11th April, 1918 they stated that they desired to discontinue the business at the earliest possible date, showing thereby that they were still in business. The profits for the accounting period to 31st December, 1917, the subject of the return were £ 36,682. Assesseees contended that they were not liable to be assessed to Excess Profits Duty in respect of the year 1917 and that Section 35 Finance Act 1918, observed on the face of it that there was no such liability. The Commissioners held that the assesseees were carrying on trade or business and were liable to be charged within Excess Profits Duty in respect of the profits arising therefrom for the accounting period from 1st January to 31st December 1917. On appeal, the King's Bench Division upheld the Commissioners finding but the Court of Appeal reversed the finding of the Commissioners and the King's Bench Division. The House of Lords upheld the finding of the Court of Appeal. It was observed that if the facts determined warranted the conclusion that the sales were realization sales and were capital transactions incidental to

winding up of the business, Excess Profits Duty could not be charged.

12 T. C. 327 & 4 T. C. 618 ref.

J. & R. O. Kane & Co. v. The Commissioner Inland Revenue.

12 T. C. 303 (309, 339, 346, 358)=55 I. L. T. R. 75=126 L.T. 707.

Section 38—Carrying on of trade for purposes of assessment to Excess Profits Duty.

Assessee had, since 1910, carried on a business of a wholesale agricultural machinery merchant in the city of London. He had never had any connection with the linen trade; nor had he ever had any transaction in surplus Government stores.

On 5th May, 1919, assessee happened to visit the Government Depot in company of some other persons and a large quantity of unbleached linen lying there, that had been acquired for the purpose of covering aeroplanes, attracted the assessee's attention and its use were explained to him by an official on the spot. Assessee decided to purchase the same before leaving the spot and after brief negotiations, did actually purchase the same in the quantity of 44,803,888½ yards at 1s. 8d. per lineal yards for a total sum of £ 3,733,625-5-5 without regard to quality or width. The assessee, feeling that the Belfast Manufacturers were his best purchasers organised, in order to alarm them, an advertising campaign, by leading them to think that their market would be undermined. For this purpose he rented an office for which he paid rent, rates and taxes; he furnished his office; installed it with a telephone and employed a staff of a number of clerks and an advertising manager at a high salary. He issued circulars, inserted advertisements on a large scale in the trade journals and important newspapers. He offered commission of 1½ percent to any body who introduced orders. He incurred an expenditure of large sum on postage and telegrams. The result was that the entire quantity of unbleached linen was sold off in the same state in which it was purchased. A sale book, a delivery book and a ledger was kept and generally all the books were kept that would normally be kept in a trading concern.

On the above facts, the assessee contended that he did not carry on any trade, or concern in the nature of trade in connection with linen that the transaction was a gambling one and that the profits were not annual, chargeable under Case VI.

He was assessed to Excess Profits Duty on the profit arising out of this linen transaction. On appeal against the assessment, the Commissioners held that in exercising the above activities, the assessee was carrying on a trade, the profits of which were assessable to Excess Profits Duty. On appeal to the King's Bench Division held (per *Rowlatt J.*) that the assessee carried on a trade and that the fact that he made only one purchase did not prevent the subject matter being a trade.

5 T. C. 159, 12 T. C. 858 and 7 T. C. 125 ref.

Martin v. The Commissioner Inland Revenue.

11 T. C. 297 (302, 308, 310).=(1926) 1 K. B. 550=95 L. J. K. B. 497=135 L.T. 523=42 T. L. R. 233=(1927) A.C. 312=96 L. J. K. B. 379=136 L. T. 580=43 T. L. R. 116.

TRADE OR BUSINESS—POST-WAR ISOLATED TRANSACTION

Finance Act, 1915, Ss. 38,39,40, Schedule IV. Part II
Isolated transaction — Business commenced after the 1914 War—Assessability to Excess Profits Duty—Construction of Finance Act 1915 and subsequent Act.

Three persons, members of three firms, engaged in wine trade, entered into a speculation independently of their firms, forming together a little syndicate for speculative purpose. They bought a large quantity of cape brandy from the Government of South Africa. They did not buy the entire quantity there all at once but piecemeal, as they did not know how much of it was there, but ultimately they did buy the whole lot.

They succeeded in selling some of it at a profit for export to the East and they brought the remainder home to the United Kingdom. They blended it with French Brandy for which they employed three firms whom they paid. They, then, recorked it in more casks, of course, and then they disposed of it piecemeal in some hundred transaction

within a period of fourteen months. It was admitted that the intention of these gentlemen forming the syndicate was to sell the whole of the brandy in question at a profit. This intention was successfully carried out in the manner above indicated. None of these three persons had ever before been engaged in a similar transaction. On assessment to Excess Profits Duty, on the profits of the sale of the said brandy in the above mentioned manner, the assessee's syndicate contended that the profits were capital profits on the realization of speculative investment and were not profits arising from any trade or business carried on by them that theirs was an exceptional and isolated transaction, not amounting to carrying on of trade or business. Alternatively, they contended that as their trade or business, if at all taken to be so, commenced in 1916, *i.e.* after the outbreak of the 1914 war, they were not chargeable to Excess Profits Duty.

There was no question or dispute as to the amounts or figures. The Commissioners held that the profits were from trade or business carried on during the accounting period and that the same were chargeable to Excess Profits Duty.

On appeal, the King's Bench Division (Per *Rowlett J.*) upheld the Commissioner's findings. The Court of Appeal also upheld the said finding, on a true construction of the 1915 Act and the subsequent Finance Act, connected therewith. Referring to Section 45 (1), Finance Act, 1920, it was observed :—

(Per *Lord Sterndale M.R.*)

"Therefore, it speaks, of a business which had no pre-war trade year and contemplates that such a business might and would be chargeable with Excess Profits Duty".

Subsequent litigation on the same subject, it was observed, might be looked into to see what is the proper construction to be put on an earlier Act, where that earlier Act is ambiguous on any point.

(1900) 1 Q.B. 156 ref.

The Cape Brandy Syndicate v. The Commissioner Inland Revenue.

12 T.C. 358 (263, 368, 373, 382)=(1921) 1 K. B. 64=
(1921) 2 K. B. 403=90 L. J. K. B. 461=150 L. T. J. 266=
125 L. T. 108=37 T. L. R. 33=37 T. L. R. 402.

Ss. 38,39 and Schedule IV Part I, R. 81 lease of property—income from dividend and of interest of investments and from rent under leases—Trade or business—Assessability to Excess Profits Duty.

Assessee company was formed to take over the lease of a theatre and some other theatrical properties. During the several five accounting periods from 1st April 1914 to 31st March, 1919, it had no interest in any theatrical property or effects. During the said five years the whole of the real estate belonging to the company was let to five tenants under leases the period of which was in no instance less than 89 years.

Apart from the secretary and directors, the company had no officers. An accountant audited the company's accounts and was paid fee for his services. The income of the company consisted of the rents payable by the aforesaid five lessors and of interests and dividend from investments. The business transacted at the directors' meetings was purely formal; accounts were received and passed, dividends declared and officers elected.

On these facts, the company contended that it did not carry on any trade or business and was not liable to payment of Excess Profits Duty, or that, alternatively, its income was excluded from liability under Rule 8, Part I, Schedule IV, Finance Act, 1915. The Commissioners, accepting the company's contention, discharged the assessment. On a case being stated, the King's Bench Division reversed the Commissioners' finding and held that the assessee company was carrying a trade or business and was assessable to Excess Profits Duty.

12 T. C. 181 ref. 12 T. C. 174 not appl.

The Commissioners Inland Revenue. v. The Birmingham Theatre Regal Estate Co. Ltd.

12 T. C. 580 (582, 584, 585, 586).

Digest of Excess Profits Duty Cases

(Under Indian Excess Profits Duty Act No. X of 1919)

BUSINESS, IF ONE.

Section 2 (5) Proviso 3 and Section 4—Assessee having two shops at different places—Business of one retail, of the other wholesale—Number of articles dealt with at the two shops varying—Not a single business—Excess Profits Duty Assessment, nature of.

Assessee had two shops at two different places, N. & E. For the purpose of assessment to Excess Profits Duty the income of his both shops were concluded together and created a single business.

Assessee contended and sought a reference to the High Court on the point, that the businesses of his two shops were different, that of shop at N being retail and dealing in over 70 articles of merchandise while that of shop at E was wholesale dealing with only four or five articles, that the accounts of the two shops were different though the goods at the two shops were of the same class.

On these facts, assessee was assessed to Excess Profits Duty on the assumption that the business was a single one with in Section 2 proviso (5) and Section 4. It was held that the expression in Section 4 in respect of any business to which this Act applies appeared to indicate a single business.

Held (by the High Court in reference) that the businesses at the two shops were different as contended by the assessee.

Commissioner of Income-Tax, Office of the Board of Revenue Madras (Referring Officer) v. N. Govindasami Naidu (Assessee).

BUSINESS, WHAT IS.

Section 2(3)—‘Business’ meaning of—Meaning of the term, the same as under Income-tax Act—Company owning house property, stalls etc.—Letting out on rent and distributing same as dividend—Not carrying on ‘business’—Nature of Excess Profits Duty—English law.

The definition of business in the Income-tax Act is reproduced *verbatim* in the Excess Profits Duty Act. Accordingly in spite of the wide language used in Section 3, it is difficult to hold that the Act contemplates any expansion of the word ‘business’ beyond the meaning assigned to it under the Income-tax Act.

The Kaladan Suratee Bazar Company Ltd. (at Moulmein and Rangoon) had its income derived solely from rents of houses and bazar stalls belonging to them. The Financial Commissioner held that as these companies existed for the purpose of owning houses and buildings to be divided into tenements and stalls and to be let out, they carried on business. According to the Financial Commissioner’s view looking to the definition of the term, ‘business’ in Section 2 Excess Profits Duty 1919, which as he observed was not exhaustive, the business of the companies was ‘business’ for the purpose of Excess Profits Duty, because they were not exempted in the Schedule of the Act as professions were.

On company’s behalf it was contended that the connotation of term ‘business’ is the same both in the Income-tax and the Excess Profits Duty Acts and that a person or company drawing income from house property was clearly not contemplated by the Income-tax Act as carrying on a business but was assessed on income from property. The Lower Burma Chief Court held (per *Sir Daniel Townsey* Chief Judge and Mr. Justice *Robinson*) that the companies were not carrying on business for the purposes of Excess Profits Duty Act. It was pointed out that although the definition of ‘business’ in the two Indian Acts (*i. e.* the Income-tax and Excess Profits Duty Acts) is not exhaustive, its looseness will not justify the introduction of things which according to the scheme of the Income-tax Act are wholly dissimilar and that an examination of the Acts did not support the Financial Committee’s view.

It was further pointed out that on general considerations also it would be difficult to hold that these Bazar companies were 'carrying on business'.

It was also pointed out (with reference to the English case *Commissioner of Inland Revenue versus Korean Syndicate* (1920) 1 K. B. 598=12 T. C. 181) that it did not make any difference that assesseees in this case were companies and not individuals. Lastly it was observed:— The mere fact that they have each a place of business and that they have registered under the Companies Act is not material. A man who has invested his capital in house property and who keeps a rent office and a staff of rent collectors, clerk etc., for the purpose of letting out his houses and collecting the rents is not carrying on a business. He is merely taking the ordinary steps necessary for enjoying the income from his property. If he bought and sold house property continually he would then, no doubt, be carrying on a business. He would be trading in house property but not if he only bought a house or sold one, from time to time, as incidental to his position as owner of house property. And this is apparently the position of the companies now under consideration. They may add to their property by purchase or by sale of a particular part of their property, from time to time, but this is only incidental to their main purpose which is to hold property and distribute the rents in the forms of dividends to the shareholders. They are no doubt an association for acquiring gain, but the method of acquiring gain is passive by owning property and not by the active carrying on of a business. I would, therefore, decide that these two companies are not liable to Excess Profits Duty.

(1880, 15 Ch. D. 247 reference).

As to the nature of Excess Profits Duty and its distinction from Income-tax it was observed:—

In framing the Excess Profits Duty Act the legislature had before them the Income-tax Act with its clear distinction between income derived from house property and income derived from business and yet we find that they impose the Excess Profits Duty only on excess profits arising out of certain business

(*vide* the preamble of the Act), not on 'certain sources of income' as we might, I think, expect if it was really intended to throw the net wider and bring under assessment to Excess Profits Duty sources of income other than those classed as business in the Income-tax Act.

As to the English law on the point that the same remark may be applicable to the term 'business' in the Indian Act, as under the English Law. It was pointed out that in the Commissioners of Inland Revenue *versus* Sangster (1920) 1 K.B. 587 10 T. C. 208; *Mr. Justice Rowlatt* remarked: "It looks as if in the use of the vague word 'business' the legislature was not glancing at anything more than what is taxable under Case I of Schedule D. Income-tax Act 1842."

Kaladam Suratee Bazar Co. Ltd. and Suratee Bazar Co. Ltd. In reference.

1 I. T. C. 50 (51, 52, 53, 54)=(1920) 56 I. C. 914.

CAPITAL EMPLOYED IN BUSINESS.

Excess Profits Duty Act, Sections 5 & 6 (1) (b) R. 20—Excess Profits Duty Rules 1920—Enhancement of Excess Profits Duty—Investment in shares of public companies and war loan and Government Securities—Loans to private individuals and business concerns—Capital employed in business period.

In this case, which was one for enhancement of Excess Profits Duty under R. 20 of the Excess Profits Duty Rules 1920, the question was whether monies invested by the partnership business, the assessee in the case, in shares or public companies, in war loans and Government securities, and loans advanced to private individuals was 'capital employed in the business.'

It was held that amounts invested in shares of public companies, in Government securities and loans to business concerns and private individuals were all items of the nature to be treated as part of the capital of the firm and were consequently to be included as such, in computation, both for the accounting and the standard periods.

Martin & Co. v. Secretary of State.

1921 Cal. 689 (641)=25 C. W. N. 875=67 I. C. 909.

CAPITAL EMPLOYED IN BUSINESS—INCREASE OF.

Excess Profits Duty Act, (1919) Section 6, Proviso 1—Increase in average capital—Burden of proof on assessee.

An income-tax assessee wishing to obtain the benefit of the proviso to Section 6, Excess Profits Duty Act, 1919, is duly bound to put before the Collector and the Board of Revenue satisfactory evidence that his capital has been increased, as alleged by him. Where he did not do so, but contented himself by putting in some very inconclusive returns, in spite of the fact that he had an opportunity of putting further evidence or further explanation before the Collector but he refused to avail himself of it and stood on the return already furnished all that could be said was that he had not brought himself with the exemption provided for in Section 6, Proviso 1.

Deputy Commissioner & Secretary to Chief Commissioner I. T. Madras. v. S. Hajee Abdulla Sahib.

1921 Mad. 717 (718)=14 M. L. W. 413=70 I. C. 30.

EXCESS PROFITS DUTY, NATURE OF.

Excess Profits Duty Act 10 of 1919—Assessment under Excess Profits Duty—nature of.

The assessment of Excess Profits Duty under the Excess Profits Duty Act 10 of 1919, is on the profits of the business and on the person owning the business or entitled to the Profits.

The Commissioner Income-Tax, Office of Board of Revenue, Madras v. N. Govindasami Naidu.

1. I. T. C. 174 (176).

EXCESS PROFITS DUTY, ACT INTERPRETATION.

Excess Profits Duty Act (1919) Construction of—Intention of Legislature—Section 4, Provision of.

The Excess Profits Duty Act contains no provisions that the tax is to be paid within one year. A comparison of the Act with the Income-tax Act makes it clear that this was not the intention of the legislature.

The Excess Profits Duty Act simply provides in Section 4 that it is to be "charged, levied and paid", and the legislature

whilst making Sections 21 to 24 and 26 to 27 as well as other Sections of the Indian Income-tax Act, 1918 has omitted Section 25, which as already mentioned, provided for the assessment in the following years, of income which has escaped assessment in any year.

Deputy Commissioner & Secretary to The Chief Commissioner I. T. Madras v. Lakshmi Dass Purushotam & Co.

1911 Mad. 228 = 44 Mad. 768 = 41 M. L. J. 189 = 14 M. M. L. W. 57 = 1921 M. W. N. 513 = 63 I.C. 420.

EXCEPTION.

Schedule 1, Excess Profits Act (10 of 1919)—English and Indian Law—Part III Finance Act 2 of 1915, Section 39 and English Income Tax Act 1842, Schedule D—Foundation of excepted business under the Indian Law.

It is interesting to compare the English legislature on the subject with the Indian enactment. The first case in Schedule D, (English) Income-tax Act, 1842 deals with duties on trade profits. It is headed, "Duties to be charged in respect of any trade, manufacture, adventure or concern in the nature of trade not contained in any other Schedule of this Act."

The first case in Schedule D is evidently the source from which the definition of 'business' in the two Indian enactments, (*i.e.* Income-tax Act 1922 and the Excess Profits Duty Act, 1919) comes. Turning now to the English Provisions for Excess Profits Duty which are contained in Part III of the Finance Act (No. 2) of 1915, Section 39, we find that 'Excess Profits Duty' applies to all trades and businesses of any description excepting:—

(a) husbandry in the United Kingdom.

(b) offices or employments: and

(c) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or any capital expenditure of a comparatively small amount; but including the business of any person taking

commissions in respect of any transactions or services rendered, and of any description (not being a commercial traveller, or any agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency.)

This is clearly the foundation of the excepted businesses schedule (Schedule 1) of our Indian Excess Profits Duty Act, X of 1919."

Kaladan Suratee Bazar Co. In re.

1. I. T. C. 50 (52)=(1920) 56 Ind. Cas 914.

Excess Profits Duty Act, 1919—Schedule 1, clause (2) Exception under offices or employments remunerated by commission not within "Excepted business"—Persons acting as agents not being whole-time servants not within the exception.

Assesseees in this case were persons acting as agents in Bombay of the Aurangabad Mill Ltd. They were entitled to receive from the company a remuneration of ten percent on the net annual profits of the company for their services as agents, subject to a minimum of Rs. 12,000 per annum. They were assessed to Excess Profits Duty.

They claimed exemption under clause (2), Schedule 1, Excess Profits Duty Act, 1919. The Chief Revenue Authority did not entertain their contention. *Held:* on reference, by the High Court that they were not entitled to the exemption claimed, that obviously it was never intended that persons in the position of the petitioners acting as agents, secretaries or treasurers, or agents of a mill company under the usual form of agreement and remunerated by a commission which would depend on outturn or amount of profits were to be considered as carrying on a business excepted under Sch. 1., and that, even if under the agreement, they were to have the general conduct and management of the business and affairs of the company, it could not be said that they were whole-time officers or servants of the company as there was nothing in the agreement to prevent them from carrying on any other business.

Doraiswami Iyer & Co. In re.

1 I.T.C. 93 (96) =(1921) I.L.R. 45 Bom. 1064=23 Bom. L.R. 609=63 I.C. 775.

INTERPRETATION OF STATUTE ENGLISH LAW.

Excess Profits Act, 1919, Schedule 1, Clause 3, proviso, Interpretation of—English law.

The proviso which comes after No. 3 in Schedule 1 is obviously taken from Section 39, Chapter 89, of the English Finance Act, 1915. That section provided that the trades and businesses to which that part of the Act applied were all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom or owned or carried on in any other place by persons ordinarily resident in the United Kingdom excepting those described in (a) (b) (c), but included the business of any person taking commissions in respect of any transactions or services rendered, or any agent of any description not being a whole time officer or servant of the business or a commercial traveller of an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency.

The draftsman of Schedule 1 evidently took that Section for his mode, but did not exercise sufficient care in the transposition of its terms which became necessary owing to the businesses excepted being entered in a schedule instead of in the body of the Act.

The last paragraph of Section 39 of the English Finance Act, made it clear that certain businesses were included in the term "all trades and businesses" and did not come within any of the exceptions. The proviso in Schedule 1 can, strictly speaking, only be appropriately attached to Exception 2 and possibly to Exception 1, but I think the only way in which the proviso can be given any meaning is to read it as governing generally the three kinds of businesses which were enumerated under headings Nos. 1, 2 and 3 or, put in another way, as including the businesses mentioned therein as within the terms of Section 3 of the Act. Any other construction given to the proviso would result in absurdity if attached to heading No. 2 only it becomes meaningless.

Doraiswami Iyer & Co., In re.

1 I. T. C. 93 (96)=(1931) I.L.R. Bom. 1064=23 B. L. R.
609=68 I.C. 775

INTERPRETATION OF WORDS & PHRASES.

Excess Profits Duty Act, 1919, Schedule II Clause, 2, Proviso—"Employed in the business meaning of".—Accumulated profits, if and when can be 'capital employed in business'—Schedule II (1) (c) proviso.

* Assessee in the case were a company carrying on business as ship-owners in Bombay. On being called upon to furnish a return of their profits for Excess Profits Duty purposes, they pointed out in their return that they were not liable to Excess Profits Duty.

On being assessed to Excess Profits Duty by the Collector of Income-tax and on notice of demand being issued, they appealed, contending that the Collector had refused to take into account cash and investments amounting to Rs. 1,08,11,684, as forming part of their capital on 31st December, 1918, except to the extent of 40 lacs, whereas, even on 31-12-1917, the cash and investments amounted to Rs. 89,82,434. They alleged the said sum of Rs. 1,08,11,684, had been retained in business for the purpose of discharging liabilities, except sums kept in liquid form for the purpose of business e. g. purchase of steamship as soon as conditions permitted. The said cash investments had, since 31st December, 1918, been reduced to Rs. 83,45,224.

The Chief Revenue Authority confirmed the assessment made by the Collector, refusing to refer the question to the High Court (as requested) on the ground that the law on the point was quite clear.

It was observed: "This company made very large profits during the war and invested a large amount of them in securities. They did not distribute these investments as dividends nor employ them in the business. They now claim that the securities are assets of the business and capital employed in the business, saying that they have entered into large contracts for laying out the money, and were prevented by the war from doing so, also that these are assets employed in the business because if the company were liquidated these sums would be used to meet the liabilities and

if the business were sold, the securities would be assets.

Under the Act, it is not the company which is liable but the *business* of the company. The first proviso in Section 6 states the basis for determining the average profits of the standard years, and states clearly that it is the average capital 'employed in the business' which is the basis. The words 'capital so employed' make this still clearer. Again Schedule 11 (1) (c) proviso shows that accumulated profits must be employed in the business if they are to be taken as capital.

It is quite clear to me that a great part of the profits which were invested are in the present case under appeal in no sense capital employed in the business, but merely immense profits obtained in exceptional circumstances which the firm did not and could not employ in the business. To allow such profits to be counted as capital would defeat the whole letter and spirit of the Act, and the result would be that those concerns which made the heaviest profits would escape all Excess Profits Duty by investing them in securities.

On the assessee obtaining a rule under Section 45, Specific Relief Act, the High Court, holding that a reference to them had been rightly disallowed by the Chief Revenue Authority, the High Court discharged the Rule and upheld the assessment. The High Court, in doing so, observed:— The petitioners claimed that the whole of their cash and investments were employed in the business. They made no attempt to assist the Collector or Chief Revenue Authority in deciding how much was employed in the business with the result that a haphazard guess was made at the amount, instead of employing proper accounting methods. The questions which the petitioners formulated in their letter of the 5th August to the Chief Revenue Authority, were really questions for a Chartered Accountant and not questions with regard to the interpretation of the Act. Supposing those questions were before the Court, they could only be answered with the assistance of experts. But it may be permissible to make a few remarks on the facts as presented to us. Ordinarily speaking the excess in a balance sheet of assets over liabilities is profit. On the balance sheet produced before us that

excess is over sixty lacs, if the reserve fund is not considered as a liability since it represents past profits which have not been distributed. But if the ships are valued as the petitioners wish them to be valued for the purpose of increasing the capital as at the end of the accounting period, the profits would be over rupees eighty-six lacs including, of course, the profits earned during the accounting period. This amount is actually represented by cash and investments and could be distributed among the share-holders by way of dividend. If, however, it was represented by ships, even though they were purchased at the end of the accounting period, it would be profits employed in the business.

As on the 31st December, 1918 it had not been so employed, it cannot be argued that it makes no difference so long as it was intended to be employed."

The Act, it was further observed: did not say that the profits *intended to be employed* in the business could be treated as capital.

(Per *Fawcett J.*) "The words 'employed in the business' in the proviso to Rule 1 of Schedule 11 to the Excess Profits Duty Act, 1919, *prima facie* bear their natural meaning of 'actually employed in the business', and cannot properly be construed as if the words were "employed or *intended to be employed* in the business." If the latter had been intended, they would presumably have been used, just as they are used in Schedule D, Cases 1 and 2, Rule 3 (f) of the English Income-tax Act, 1918, which specifies "any sum employed or intended to be employed as capital in such trade, profession, employment or vocation."

Bombay & Persia Steam Navigation Co. v. In re.

1 I. T. C. 97, (98) (102) = (1921) I. L. R. 45 Bom. 881 = 28 B.L.R. 139 = 60 I.C. 964.

(The above decision was reversed by their Lordships of the Privy Council. See *Alcock*, *Ashdown's* case reported *infra*).

Excess Profits Duty Act (X of 1919) Section 18, Rules under—R. 24 (3), Proceedings for the recovery of any sum meaning of—commencement of proceedings.

Under Section 18, Excess Profits Duty Act, 1919, there are

certain rules made. In R. 24 (3) of these rules, the words, "proceedings for the recovery of any sum" occur. The sub-rule provides that, same in accordance with the provisions of sub-rule (1) of rule 11 the proceedings for the recovery of any sum payable under the Act or these rules shall be commenced after the 31st March, 1921. The question in the case was whether the words, "proceedings for the recovery of any sum" refer to proceedings taken after default has been made in payment or whether such proceedings began when a notice of demand has been served on the assessee.

It was held that the above expression means the proceedings taken under sub-rule (1) of this rule (*i.e.* R. 24) after default has been made in payment.

Gian Singh Bahadur Singh v. The Crown.

1924 Lah. 54=4 L. 165=73 I. C. 106.

PROFITS ASSESSABLE.

Excess Profits Duty Act, 1919—Ss. 2, 3, 15 and R. 31
E. P. D. Rules—Income from racing if profits liable to
Excess Profits Duty—Income from non-members, liability
of, to Excess Profits Duty—"Carrying on of business".

Assessee, in this case, the Royal Calcutta Turf Club was assessed to Excess Profits Duty on its income from racing under Excess Profits Duty, 1919.

The Club requested the Chief Revenue authority for a case to be stated for the opinion of the High Court, under Section 15, Excess Profits Duty Act, modified by R. 31, of the Excess Profits Duty Rules.

The club was for the first time assessed to income-tax in 1918 and its liability to income-tax was not disputed. It was, however, contended that its income did not include any profits from a business within the meaning of Excess Profits Duty Act.

Entrance fee to the stand, paddocks and enclosures, or gate money, entrance fee paid by owners of horses, horsekeepers, license fees, percentage on the totalizators and percentages on sweeps on the Derby and St. Ledger, all received from non-members were the heads of income treated by the Board of

Revenue as profits liable to Excess Profits Duty. It was considered that the facts that the members of the club did not derive any profits or that a part of the income was employed in charity did not, affect the case, in the Board's opinion.

The club controlled and encouraged racing and country horse breeding and looked to the general convenience and comforts of the members and of those attending the races.

The High Court held that the club was liable to Excess Profits Duty, on the income of the club from the sources above enumerated except "percentage on sweeps on Derby and St. Ledger".

It was also held that the club were carrying on either a trade or an adventure or concern in the nature of trade (it not being decided whether the definition of the term 'business' in Excess Profits Duty Act Section 2 was exhaustive.

Carlisle and Silloth Golf Club v. Smith.

(1912) 2 K. B. 177 = (1913) 3 K. B. 75 = 12 T. C. rel.

The observations of the Master of Rolls, Lord Justice, Buckley and Lord Justice Kennedy, as under, were cited by the High Court as authority and interpretation of the term, carrying on of business (*Master of Rolls*): It seems to me that there is a real difference between the moneys received from members and applied for the benefit of members and moneys received by the Club from strangers. I cannot draw any distinction between gate moneys, which might be, and, I believe, sometimes are, received by a Golf Club, and green money, in each case the Club would be assessable".

Lord Justice Buckley.—If it were necessary (which it is not) to decide whether the Club were carrying on an adventure or concern in the nature of trade, I am of opinion that they were, to determine this question it is not the character of the person who carries on but the character of the concern which is carried on that has to be regarded. If a land-owner laid down upon his land a golf course and charged fees for admission and used it, that is to say, the links were a proprietary golf links carried on with a view to profits, there can be no question but that the proprietor would be assessable.

Lord Justice Kennedy.—But upon the facts appearing in the case, it appears to me that this club is really carrying on the business of supplying to the public for reward a recreation ground fitted for the enjoyment of the game of golf, and that the receipts derived from this business are in the nature of profits and gains in respect of which it is liable to assessment for income-tax. As to the point that the members did not derive any benefit from the club and that surplus is used for charity, it was observed: "It does not seem to me material what is the ultimate destination of the surplus, if any, which the Royal Calcutta Turf Club receives in respect of these matters. The test is whether the moneys are received by the Club from non-members of the Club and in exchange for something high is given by the Club and in respect of which profit is made".

The Royal Calcutta Turf Club v. The Secretary of State for India in Council.

1 I. T. C. 108 (111, 112 & 113)=(1921) I.L.R. 48 Cal. 844
=25 C.W.N. 734=66 I.C. 473.

PROFITS—ASSESSABLE, SUPERTAX.

Excess Profits Duty Act, 1919—Section 19—Scope and applicability of.

Section 19 merely provides for the protection of the taxpayer, that the profits of any business shall not be chargeable both with super-tax and excess profits duty, but with whichever is the higher, and has no application to a case in which profits are chargeable only with Excess Profits Duty and not with super-tax. It does not relieve profits from the liability to Excess Profits Duty by Section 4 unless such profits are chargeable with super-tax and the super-tax exceeds the Excess Profits Duty.

Deputy Commissioner & Secretary to Chief Commissioner Income tax, Madras. v. Lakshmi Dass Purushotham & Co.

1921 Mad. 228=44 Mad. 768=41 M. L. J. 189=14 M. L. W. 57=1921 M. W. N. 513=63 I. C. 720.

REFERENCE TO HIGH COURT.

Excess Profits Duty Act, 1919—S. 6 & proviso to S. 6(1)
Interest bearing securities whether capital employed in
business—Question of law, fit for reference to High Court
Point of law—duty to state a case, S. 45 Specific Relief
Act, applicability of English and Indian Law, difference
between.

In this case, assessees were assessed by the Collector of Income-tax to Excess Profits Duty for the accounting period ending 31st December 1918. They had elected to have the standard profits of the business ascertained under Section 6 (1) (b) (iii) Excess Profits Duty Act, 10 of 1919.

They claimed a deduction in accordance with the first proviso to Section 6 (1) (b) of the said Act in computing the profits chargeable, on account of an increase of average capital employed in the business at the end of the accounting period. In the alternative they prayed for a statement of case to the High Court for opinion.

The Chief Revenue Authority declined either to discharge the assessment or to refer the case to the High Court for opinion. Assesseees, therefore, obtained a rule under Section 45, Specific Relief Act, which was later discharged by the High Court (Bombay) (*vide* 1 I. T. C. 97, 98 Bombay Persia Steam Navigation Company case above) on the ground that the question involved was one of fact and that, therefore, as the Chief Revenue Authority had rightly decided, a reference to the High Court was unnecessary.

On appeal to the Judicial Committee of the Privy Council, the finding of the Bombay High Court was reversed and the Rule *nisi* was made absolute.

Re: the application of Section 45, Specific Relief Act, while holding that Section 45 applied, their Lordships of the Privy Council observed : — "In their Lordships view, the order of the High Court to a Revenue officer to do his statutory duty would not be the exercise of 'original jurisdiction in any matter concerning the revenue,' and the latter part of the clause need not be considered, for the proceedings in this case had not to do with

the collection of the revenue, but with the preliminary assessment to ascertain what that revenue was."

On the point of the duty of the Revenue Authority to state a case, it was pointed out "In their Lordships view, always supposing that there is a serious point of law to be considered. there is a duty upon the Chief Revenue Authority to state a case for the opinion of the Court, and if he does not appreciate that there is such a serious point, it is in the power of the Court to control him and to order him to state a case.

On the facts of the particular case and as to the question involved as being one of law, their Lordships observed :—

"The High Court has apparently considered that there is no serious point of law involved in this case. It was, indeed, contended by counsel for the respondent that the High Court had accepted the position that there was a question of law and then had gone on to decide it adversely to the appellant but their Lordships think this contention inadmissible. If there is a point of law, it ought to be decided in a regular manner and upon proper materials; and here it should be said that the manner is not regular and that it is at least doubtful whether the material are complete."

Their Lordships then, proceeded to observe :—"In their Lordships' view, an important question of law upon the construction of the statute is involved. This may be most tersely expressed by asking the question what are the interest bearing securities which form part of the assets of business and are, therefore, to be treated as part of the capital ; and one guide in arriving at this conclusion may well be the difference of language between the later Indian and the earlier English Act."

Pointing out the difference between the Indian and the English Law on the point their Lordships observed :—"It is true that these are not Acts of the same legislature, and that the Indian legislature and the draftsman whom it employed may have thought it unnecessary to introduce provisions like those coined in paragraphs 8 and 12 of Part 1 of the fourth schedule of the English Act, and may have meant to variation from the scheme of the English Act when it and he introduced the word

'securities' and spoke of interest on certain securities as being profits from the business. Too much stress, therefore, should not be laid on these differences. At the same time, it is noteworthy that the Indian Act takes notice of the English Act in Schedule 1, para 4, and the Court may come to the conclusion that the reason for the differences between the two Acts not a mere difference of drafting, but a deliberate variation due to the difference of condition under business is carried on in India and in England."

Alcock, Ashdown & Co., Ltd. v. The Chief Revenue Authority
 1 I. T. C. 221 (225, 226, 227) = (1923) I.L.R. 47 Bom. 742
 = 50 I. A. 227 = 25 Bom. L. R. 920 = 45 M. L. J. 592 = (1923)
 M.W.N. 557 = 33 M.L.T. (P.C.) 267 = 18 L. W. 918 = 21 A.L.J.
 689 = 39 C.L.J. 302 = 28 C.W.N. 762 = A.I.R. (1923) P.C. 138
 = 75 I.C. 392.

Excess Profits Duty Act, 1919—Section 15—Reference by Chief Revenue Authority to High Court—when may be made—Section 45 Specific Relief Act, 1877—Wise exercise of discretion by Chief Revenue Authority—Court's Power.

Under Section 15 of the Excess Profits Duty Act, Sections 49 to 52 of the Income-tax Act 1919, were applicable. According to Section 51 of the last mentioned Act, the Chief Revenue authority had the discretion and power to draw up a statement of the case and refer it to the High Court for opinion, where a question arose with reference to the interpretation of any of the provisions of the Act or of any rules thereunder.

Under the said Section 51, the Chief Revenue Authority was authorized to come to a decision that a reference was unnecessary where application for reference is thus refused, the Court might consider whether it was incumbent on the Chief Revenue Authority to make the reference. For this purpose, it may as well be to consider the petition on its merits and to see whether the Chief Revenue Authority exercised a wise discretion in coming to the conclusion that a reference was unnecessary.

Doraiswami Iyer & Co. In re.

1 I. T. C. 98 (95) = (1921) I.L.R. 45 Bom. 1064 = 23 Bom. L.R.
 609 = 63 I.C. 775.

PART III

United-Kingdom Excess Profits Tax.

Extract from the English Finance Act No. 2 of 1939.

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PART III

Charge of Excess Profits Tax.

12. (1) Where the profits arising in any chargeable accounting period from any trade or business to which this section applies exceed the standard profits, there shall, subject to the provisions of this part of this Act, be charged on the excess a tax (to be called the Excess Profits Tax) equal to three-fifths of the excess.

(2) Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom or carried on, whether personally or through an agent by persons ordinarily resident in the United Kingdom.

(3) The carrying on of a profession by an individual or by individuals in partnership shall not be deemed to be the carrying on of a trade or business to which this Section applies if the profits of the profession are dependent wholly or mainly on his or their personal qualifications :

Provided that for the purpose of this sub-section the expression 'profession' does not include any trade or business consisting wholly or mainly in the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts.

(4) Where the functions of a company or society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this Section to be a business carried on by the company or Society.

(5) All trades or businesses to which this Section applies carried on by the same person shall be treated as one trade or business for the purposes of this part of this Act.

Computation of Standard Profit.

18. (1) For the purposes of this part of this Act the standard profits of a trade or business shall, in relation to any chargeable accounting period, be taken, if the person carrying on the trade or business so elects, to be the minimum amount specified in sub-section (2) of this Section, and, in the absence of such an election, to be the amount of the standard profits for a full year computed in accordance with the provisions of sub-sections (3) to (9) of this Section :

Provided that in relation to a chargeable accounting period which is less than twelve months, the standard profits shall be taken to be the amount in question proportionately reduced so as to correspond with the length of the period.

(2) The minimum amount referred to in subsection (1) of this Section is one thousand pounds, or in the case of a trade or business carried on by a partnership or by a company the directors whereof have a controlling interest therein, such greater sum, not exceeding three thousand pounds as is arrived at by allowing seven hundred and fifty pounds for each working proprietor in the trade or business.

In this sub-section : —

(a) the expression 'working proprietor' means a proprietor who has, during more than one half of the chargeable accounting period in question, worked full time in the actual management or conduct of the trade or business;

(b) the expression, 'proprietor' means, in the case of a trade or business carried on by a partnership, a partner therein, and, in the case of a company, any director thereof 'owning not less than one-fifth of the share capital of the company.

(3) If the trade or business was commenced on or before the first day of July, nineteen hundred and thirty-six, the standard profits for a full year shall be ascertained by reference to the standard period as hereinafter defined and, subject as hereinafter provided, shall be, where the standard period is one year, the amount of those profits and, where the standard period is two years, half the amount of those profits :

Provided that if the average amount of the capital employed in the trade or business in any chargeable accounting period is greater or less than the average amount of the capital employed therein in the standard period, the standard profits for a full year shall, in relation to that chargeable accounting period, be increased, or, as the case may be, decreased, by the statutory percentage of the increase or decrease in the average amount of the capital employed in the trade or business.

(4). If the trade or business was commenced on or before the first day of January, nineteen hundred and thirty-five, the standard period shall be, at the option of the person carrying on the trade or business, either the year nineteen hundred and thirty-five, the year nineteen hundred and thirty-six, the years nineteen hundred and thirty-five and nineteen hundred and thirty-seven or the years nineteen hundred and thirty-six and nineteen hundred and thirty-seven.

(5). If the trade or business was commenced after the first day of January, nineteen hundred and thirty-five, and on or before the first day of January, nineteen hundred and thirty-six, the standard period shall, at the option of the person carrying on the trade or business, be the year nineteen hundred and thirty-six or that and the following year.

(6). If the trade or business was commenced after the first day of January, nineteen hundred and thirty-six, and on or before the first day of July in that year, the standard period shall be such consecutive period of twelve months ending not later than the end of June, nineteen hundred and thirty-seven, as the person carrying on the trade or business may select.

(7) If, on the application of the person carrying on trade standard or business, the Board of Referees are satisfied that, in the standard period, the rate of profit or the volume of business was less than might then have been reasonably expected, they may direct that the standard profits for a full year shall be ascertained as if the profits for the standard period were such greater amount as they think just:

Provided that where the person carrying on the trade or

business is a company, the said amount shall not exceed the amount necessary to provide dividends for the standard period:—

- (a) as respects the paid-up ordinary share capital of the company, of six per cent. per annum ;
- (b) as respects any other paid-up share capital of the company, at the fixed rate per annum payable in respect thereof unless the Board are satisfied that owing to some specific cause peculiar to the trade or business it is just that a greater amount should be allowed.

(8). In the case of trade or business commenced after the first day of July, nineteen hundred and thirty-six, the standard profits for a full year shall, in relation to any chargeable accounting period, be the statutory percentage of the average amount of the capital employed in the trade or business in that chargeable accounting period.

(9) In this Section the expression 'Statutory percentage' means :—

- (a) in relation to a trade or business carried on by a body corporate (other than a company the directors whereof have a controlling interest therein), eight per cent;
- (b) in relation to a trade or business not so carried on, ten per cent:

Provided that in relation to any decrease of capital the statutory percentage shall be in all cases six percent.

Provisions as to Computation of Profits and capital.

14. (1) For the purposes of this part of this Act, the profits arising from a trade or business in the standard period or in any chargeable accounting period shall be separately computed, and shall be so computed on Income-tax principles as adapted in accordance with the provisions of Part 1 of the Seventh Schedule to this Act:

Provided that where a standard period or chargeable accounting period is not an accounting period, the profits or losses of the trade or business for any accounting periods wholly or partly included within the standard period or chargeable accounting period shall be so computed as aforesaid, and such division and

apportionment of those profits or losses and such aggregation of those profits or losses, or any apportioned part thereof, shall be made as appears necessary to arrive at the profits arising in the standard period or chargeable accounting period; and any such apportionment shall be made in proportion to the number of months or fractions of months in the respective periods, unless Commissioners, having regard to any special circumstances, otherwise direct.

For the purposes of this sub-section, the expression 'income-tax principles' in relation to a trade or business means the principles on which the profits arising from the trade or business are computed for the purposes of income tax under Case 1 of Schedule D, or would be so computed if income-tax were chargeable under that case in respect of the profits so arising.

(2) The average amount of the capital employed in a trade or business in the standard period or any chargeable accounting period shall be computed in accordance with Part II of the Seventh Schedule to this Act.

(3) Losses shall be computed for the purposes of this part of this Act in the same manner as, under this Section, profits are to be computed for these purposes.

Relief in Respect of Deficiency of Profits.

15. (1) For the purposes of this part of this Act a deficiency of profits shall be deemed to have occurred in a trade or business in any chargeable accounting period if the profits arising from the trade or business in that period are less than the standard profits, or if a loss is sustained in the trade or business in that period; and the amount of the deficiency occurring in any such period shall be taken to be—

- (a) Where profits have been made in the period, the amount by which those profits fall short of the standard profits;
- (b) Where a loss has been sustained in the period, the amount of the loss added to the amount of the standard profits.

(2) Where a deficiency of profits occurs in any chargeable accounting period in any trade or business, the profits

chargeable with excess profits tax arising from the trade or business shall be deemed to be reduced, and relief shall be granted in accordance with the following provisions:—

- (a) the aggregate amount of the profits so chargeable for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency, and the amount of Excess Profits Tax payable in respect thereof shall be deemed to be reduced accordingly, and the relief necessary to give effect to the reduction shall be given by repayment or otherwise;
- (b) Where the amount of deficiency exceeds the aggregate amount of the profits so chargeable for the previous chargeable accounting periods, the balance of the deficiency shall be applied in reducing any profits so chargeable for the next subsequent chargeable accounting period, and, if and so far as it exceeds the amount of those, profits, any profits so chargeable for the next subsequent chargeable accounting period, and so on.

Succession and Amalgamation.

16. As from the date of any change in the persons carrying on a trade or business, the trade or business shall, subject to the provisions of this Section, be deemed for the purposes of this part of this Act to have been discontinued and a new trade of business to have been commenced.

(2) Where the change took place before the first day of April, nineteen hundred and thirty-nine, and consisted in the death or retirement of a partner, or the taking in of a partner, the persons carrying on the trade or business after the change may, by notice in writing to the Commissioners, elect that, for the purposes of the provisions of this part of this Act relating to the computation of standard profits, the trade or business shall not be deemed to have been discontinued.

(3) A trade or business shall not, for the purposes of the provisions of this part of this Act relating to the computation of standard profits, be deemed to be discontinued by reason of any change occurring on or after the first day of April, nineteen hundred and thirty-nine, in the persons carrying it on, and the standard profits of the trade or business in relation to any

chargeable accounting period shall be computed accordingly, and, in particular in computing the capital employed in the trade or business after the change, no regard shall be had to any consideration given in respect of the transfer of the trade or business or any of the assets thereof on the occasion of the change.

(4) Where, on or after the first day of April, nineteen hundred and thirty-nine, two or more trades or businesses are amalgamated, the resulting trade or business shall be treated for the purposes of the provisions of this part of this Act relating to the computation of standard profits as if:

- (a) it had been in existence throughout the period during which there were in existence any of the former trades or businesses;
- (b) any profits made or losses incurred or capital employed in any of those former trades or businesses had been made, incurred or employed in the resulting trade or business; and
- (c) any assets of any of those former trades or businesses had become assets of the resulting trade or business when they became assets of the former trade or business; and, in particular, in computing the capital employed in the resulting trade or business, no regard shall be had to any consideration given in respect of the transfer of any of those former trades or businesses or any of the assets thereof on the occasion of the amalgamation.

(5) Where, on or after the first day of April, nineteen hundred and thirty-nine, part of a trade or business is transferred as a going concern by the person theretofore carrying it on to another person, the part transferred and the part not transferred shall each be deemed for the purposes of the provisions of this Act relating to the computation of standard profits to be a continuation of the original trade or business, and the said provisions, including the provisions of this Section relating to amalgamations, shall apply accordingly, subject to any necessary modifications:

Provided that, for the purposes aforesaid, such apportionments shall be made of the profits made, and losses incurred

and the capital employed, in the original trade or business, and of any assets of the original trade or business, as may appear to the Commissioners, or, on appeal to the Board of Referees, to that Board, to be just.

(6) Notwithstanding anything in the foregoing provisions of this Section, where a trade or business was carried on immediately before the first day of July, nineteen hundred and thirty-six, and that trade or business or the main part of that trade or business was transferred after the said day and before the first day of April, nineteen hundred and thirty-nine, by the person carrying it on to another person, the Commissioners, if they are satisfied that the trade or business carried on after the transference was not substantially different from the trade or business or part transferred, may, on the application of the person carrying on the trade or business after the transference, treat that person, for the purposes of the provisions of this Act relating to the computation of standard profits, as if he had carried on the transferred trade or business or part of a trade or business as from the date of the commencement of that trade or business, subject, however, to such modification (including modifications as respects the computation of capital) as may be just.

Provided that if the Commissioners refuse an application under this sub-section or if the applicant is dissatisfied with any modifications made by the Commissioners, the applicant may appeal to the Board of Referees.

Provisions as to Inter-connected Companies.

17. (1) Where any interest, annuity or other annual payment, or any royalty or rent, is paid by one body corporate to another body corporate, and one of those bodies corporate is a subsidiary of the other, or both are subsidiaries of a third body corporate, the capital, profits and losses of both bodies corporate shall be computed for the purposes of this part of this Act as if

- (a) the interest, annuity, annual payment, royalty or rent were not payable;

(b) any debt in respect of which any such interest is payable did not exist; and

(c) any asset in respect of which any such royalty or rent is payable were the property of the body corporate paying the royalty or the rent.

(2) Where—

(a) a body corporate (hereinafter referred to as 'the principal company') is resident in the United Kingdom and is not a subsidiary of any other body corporate resident in the United Kingdom; and

(b) during the whole or any part of any chargeable accounting period of the principal company, another body corporate, whether or not resident or carrying on business within the United Kingdom (hereinafter referred to as 'the subsidiary company') is a subsidiary of the principal company, the following provisions of this section shall have effect in relation to that chargeable accounting period.

(3) if the subsidiary company is a subsidiary of the principal company throughout the chargeable accounting period, such capital employed in, and profits or losses arising from, the trade or business of the subsidiary company as is employed or arise in—

(i) the chargeable accounting period; or

(ii) any year constituting or comprised in the standard period of the principal company, shall be treated for the purposes of this part of this Act, as if it or they were capital employed in, or as the case may be, profits or losses arising from, the trade or business of the principal company.

(4) If the subsidiary company is a subsidiary of the principal company during part only of the chargeable accounting period, the excess or deficiency of profits of the subsidiary company for that part of that period shall be treated as increasing or, as the case may be, decreasing the excess or deficiency of profits of the principal company for the whole period and shall not be

deemed to be an excess or deficiency of profits of the subsidiary company.

In this sub-section, the expressions 'excess' and 'deficiency' mean, in relation to profits, an excess or deficiency in relation to the standard profits of the subsidiary company or, as the case may be, the principal company.

(5) In any case in which sub-section 3 or sub-section 4 of this Section applies, such alteration, if any, of the periods which would otherwise be the chargeable accounting periods of the subsidiary company shall be made as the Commissioners may direct.

(6) For the purposes of this Section, a body corporate shall be deemed to be a subsidiary of another body corporate if and so long as not less than nine-tenths of its ordinary share capital is owned by that other body corporate, whether directly or through another body corporate or other bodies corporate, or partly directly and partly through another body corporate or other bodies corporate; and the provisions of sub-sections 2 and 3 of Section forty-two and part I of the Fourth Schedule to, the Finance Act, 1938, shall have effect for the purposes of this sub-section have they effect for the purposes of the said Section forty-two.

Relation of Excess Profits Tax to Income Tax.

18. (1) The amount of the Excess Profits Tax payable in respect of a trade or business for any chargeable accounting period shall, in computing for the purposes of income-tax the profits and gains arising from that trade or business, be allowed to be deducted as an expense incurred in that period:

Provided that where, under the provisions of this Act relating to deficiencies of profits, relief is given by way of repayment from Excess Profits Tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed under this Section shall not be altered but the amount repayable shall be taken into account in computing the profits and gains of the trade or business for the purposes of income-tax as

if it were a profit of the trade or business accruing in the chargeable accounting period in which the deficiency occurs.

(2) The provisions of this Section do not apply to the computation of the profits of a trade or business for the purposes of the national defence contribution.

Relation of Excess Profit Tax to National Defence Contribution

19. (1) in the case of each chargeable accounting period to which this Section applies, there shall be computed the total excess profits tax chargeable for that period and all previous chargeable accounting periods to which this Section applies, and the total national defence contribution chargeable for all those period.

The said total excess profits tax shall be computed as if there were no national defence contribution and the said total national defence contribution shall be computed as if there were no Excess Profits Tax.

(2) if, in the case of any chargeable accounting period to which this Section applies, the total national defence contribution computed under sub-section I of this Section is the higher, the national defence contribution and not excess profits tax shall be charged in respect of that period, but in any other event excess profits tax, and not national defence contribution, shall be charged in respect of that period:

Provided that the amount charged shall not in any event exceed the difference between the higher of the said totals and the total of the amounts, whether of national defence contribution or excess profits tax, charged (and not repaid) in respect of the previous chargeable accounting period, if any, to which this Section applies.

(3) Where the profits chargeable with excess profits tax arising in any chargeable accounting period to which this Section applies are deemed to be reduced by reason of deficiency occurring in any subsequent chargeable accounting period, the amount of excess profits tax repaid or otherwise allowed shall, notwithstanding the reduction, not exceed such an amount as will reduce the total excess profits tax chargeable for all

the chargeable accounting periods (up to and including that in which the deficiency occurs) to the total national defence contribution which would have been chargeable in respect of all those periods if this part of this Act had not been passed.

(4) The chargeable accounting periods to which this Section applies are the chargeable accounting periods (as defined by this part of this Act in relation to excess profits tax) which fall before the first day of April nineteen hundred and forty-two :

Provided that where a chargeable accounting period as so defined falls partly before and partly after the said date, this Section shall have effect as if so much of that chargeable accounting period as falls before the said date were a separate chargeable accounting period as so defined, and as if the profits or losses of that separate chargeable accounting period were an apportioned part of the profits or losses arising in the whole period.

(5) Where a chargeable accounting period to which this section applies is not also a chargeable accounting period for the purposes of national defence contribution—

(a) references to the national defence contribution for that chargeable accounting period shall be taken to be references to a sum arrived at by apportioning and aggregating the amounts of national defence contribution payable in respect of any chargeable accounting period (as defined for the purposes of the national defence contribution) which falls wholly or partly within the first-mentioned chargeable accounting period;

(b) effect shall be given to any provision of this Section requiring relief to be given from the national defence contribution payable in respect of a chargeable accounting period to which this Section applies by apportioning the amount of that relief among the chargeable accounting periods (as defined for the purposes of the national defence contribution) which fall wholly or partly within the first-mentioned chargeable accounting period, and making reductions accordingly in the

amounts payable by way of national defence contribution in respect of those periods.

(6) Any apportionment required to be made by this Section shall be made by reference to the number of months or fractions of months in the period to which the apportionment relates.

Repeal of Armament Profits Duty.

(20). Armament profits duty shall not be charged and accordingly part III of the Finance Act, 1939, and the ninth schedule to that Act are hereby repealed.

Assessment, Collection, Appeal etc.

21. (1) Excess profits tax shall be assessed and collected by the Commissioners, and shall be due and payable at the expiration of one month from the date of assessment and shall be recoverable as a debt due to His Majesty from the person on whom it is assessed.

(2) The provisions of the fifth schedule to the Finance Act, 1937 (which relate to the assessment and the collection of the national defence contribution, appeals and supplementary provisions) including the provisions therein enabling the Commissioners to make regulations, shall have effect with respect to excess profits tax as they have effect with respect to national defence contribution.

Provided that:—

- (a) no appeal shall lie to the General or special Commissioners in respect of any matter with respect to which an appeal lies to the Board of Referees, or which is by this part of this Act to be decided by that Board, or is left to the discretion of the Commissioners;
- (b) the commissioners shall have the like power of making regulations with respect to the hearing of appeals and the deciding of any matters by the Board of Referees under this part of this Act as they have of making regulations with respect of the hearing of appeals under part II of the said Schedule.

Interpretation of part III.

22. For the purpose of this part of this Act—

- (a) the expression 'the Commissioners' means the Commissioner of Inland Revenue;
 - (b) the expression 'the Board of Referees' means the Board of Referees for the purpose of Rule 6 of the Rules applicable to Cases I and II of Schedule D of the Income-Tax Act, 1918;
 - (c) The expressions 'Company' and 'Director', and, except in the provisions of this part of this Act relating to subsidiary companies, the expression 'ordinary share capital,' have the same meanings as they have for the purposes of the Fourth Schedule to the Finance Act, 1937.
 - (d) the expression 'the fixed rate,' in relation to share capital other than ordinary share capital, includes a rate fluctuating in accordance with the standard rate of income-tax;
 - (e) the expression 'chargeable accounting period' means in relation to excess profits tax.
 - (a) any accounting period beginning on or after the first day of April, nineteen hundred and thirty-nine; and
 - (b) so much of any accounting period beginning before that date as falls on or after that date;
 - (f) the accounting periods of a trade or business shall be determined in the same manner as the accounting period of a trade or business are directed by sub-section (2) of Section 20 of the Finance Act, 1937, to be determined for the purposes of the national defence contribution.
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SEVENTH SCHEDULE.**Computation of profits and capital for purposes of
Excess Profits Tax.****PART I.***Adaptions of Income-Tax Principles as to Computation
of Profits.*

1. The profits shall be taken to be the actual profits arising in the accounting period, and the principles of computing profits by reference to any other period and of allowing losses sustained in any other period to be carried forward shall not be followed.
2. There may be deducted in respect of any accounting period a sum (ascertained on the like basis as the amount of a deduction for wear and tear is ascertained under Rule 6 of the Rules applicable to Cases I and II of Schedule D) which represents the diminution in value by reason of wear and tear during that period of any plant or machinery in respect of which a deduction can be made under the said Rule 6, plus, in the case of an accounting period which constitutes or includes the whole or any part of the standard period, ten per cent., and, in the case of any other accounting period, twenty percent., of that sum.
3. (1) Where any buildings, plant or machinery have after the beginning of the year nineteen hundred and thirty seven, been provided for the purpose of the trade or business by the person carrying on the trade or business, then, if either—
 - (a) on such rate as Parliament may hereafter determine, the buildings, plant or machinery have, wholly or partially, become obsolete or ceased to be required and the value thereof is less than the net cost thereof; or
 - (b) the buildings, plant or machinery are sold before the said date at a price which is less than the net cost thereof, and, in either case, the deficiency is wholly or mainly ascribable to conditions prevailing as a consequence of the present war, there shall be allowed in respect of each accounting period which constitutes or includes a chargeable accounting period such proportion of the deficiency as is properly attributable to that accounting period, less the amount of any allowances

for wear and tear or depreciation already made for that period in respect of the buildings, plant or machinery otherwise than under this paragraph, and if any plant or machinery provided as aforesaid is replaced, no allowance other than that made under this paragraph shall be made in respect of the amount expended in the replacement thereof.

The reference in this sub-paragraph to allowances for wear and tear already made for an accounting period shall be construed as including a reference to the additional percentage for which provision is made by paragraph 2 of this Part of this Schedule.

(2) Pending an ascertainment whether any allowance falls to be made under sub-paragraph (1) of this paragraph in respect of buildings, plant or machinery, the Commissioners, if they are satisfied that any buildings, plant or machinery provided as aforesaid are of such a character that it is likely that the conditions specified in the said sub-paragraph will be fulfilled in the case thereof, may allow in any accounting period which constitutes or includes a chargeable accounting period such sums as they think fit, not exceeding ten per cent. (or if the accounting period is less than a year, a proportionately reduced amount) of the net cost of the buildings, plant or machinery, but any such allowance shall be provisional only, and on the coming of the said date, or, as the case may be, on the previous sale of the buildings, plant or machinery, the amount thereof shall be adjusted so as to accord with the provisions of the said sub-paragraph.

(3) In this paragraph, the expression 'net cost' means, in relation to any buildings, plant or machinery, the cost of the provision thereof less any sum provided, or to be provided, directly or indirectly, out of the Consolidated Fund of the United Kingdom or of the Northern Ireland, or out of moneys provided by the Parliament of the United Kingdom or the Parliament of Northern Ireland, towards the cost of the provision of the buildings, plant or machinery or towards any depreciation thereof.

(4) The principles of the Income Tax Acts under which deductions are not allowed for interest, annuities or other annual payments payable out of the profits, or for royalties, or (in certain

cases) for rent, and under which the annual value of lands, tenements, hereditaments or heritages occupied for the purposes of a business is excluded, and under which a deduction may be allowed in respect of such annual value, shall not be followed :

Provided that :—

(a) nothing in this paragraph shall authorise any deduction in respect of any payment of dividend or distribution of profits,

(b) for the purposes of this paragraph, any additional deduction allowable for income tax purposes by virtue of the proviso to paragraph (2) Rule 5 of the Rules applicable to Cases I and II of Schedule D, and any deduction allowable for those purposes under Section 18 of the Finance Act, 1919, shall not be treated as a deduction in respect of annual value.

5. The provisions of sub-section (4) of Section twenty-seven of the Finance Act, 1920 (which disallows deductions on account of the payment of Dominion income-tax) shall not apply.

6. (1) Income received from investments shall be included in the profits in the cases and to the extent provided in sub paragraph (2) of this paragraph and not otherwise.

(2) In the case of the business of building society or of a banking business, assurance business or business consisting wholly or mainly in the dealing in or holding of investments, the profits shall include all income received from investments, being income to which the persons carrying on the business are beneficially entitled.

(3) Where the person carrying on a trade or business is the beneficial owner of any investments, the income from which is by virtue of the provisions of the paragraph not to be taken into account in computing the profits of the trade or business, and a deduction would apart from the provisions of this paragraph fall to be made in respect of interest on borrowed money, the deduction (if any) to be made in respect of that interest shall be computed as if the principal of the borrowed money were reduced by the value of those investments :

Provided that where the person carrying on the trade or business is not a body corporate no such reduction shall be treated as made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and interest thereon.

7. Subject to the provisions of the last fore-going paragraph, the profits shall include all such income arising from the trade or business as is chargeable to income-tax under Case I of Schedule D, or would be so chargeable if the profits of the trade or business were chargeable under that Case, except income which is, or would be, exempted from income-tax by virtue of Section 39 of the Income-Tax Act, 1918, or Section 30 of the Finance Act, 1921.

8. No deduction shall be made on account of liability to pay, or payment of, United Kingdom income-tax, the national defence contribution, or excess profits tax.

9. No deduction shall be made in respect of any transaction or operation of any nature if and so far as it appears that the transaction or operation has artificially reduced or would artificially reduce the profits.

10. (1) In the case of a trade or business carried on in any accounting period which constitutes or includes a chargeable accounting period by a company the directors whereof have a controlling interest therein—

(a) if the standard profits of the company are computed by reference to the profits of a standard period, no deduction shall be allowed in respect of directors' remuneration in excess of the amount paid for directors' remuneration in respect of the standard period or, if the standard period is longer than the accounting period, in excess of so much of the sum paid for directors' remuneration in respect of the standard period as bears to the total amount thereof the like proportion as the length of the accounting period bears to that of the standard period;

(b) if the standard profits are not computed by reference

to the profits of a standard period, no deduction shall be allowed in respect of directors' remuneration.

(2) In this paragraph the expression "Directors' remuneration" does not include the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through the medium of other companies or by any other indirect means, to control, more than five per cent of the ordinary share capital of the company.

11. Where the performance of a contract extends beyond the accounting period, there shall (unless the Commissioners, owing to any special circumstances, otherwise direct) be attributed to the accounting period such proportion of the entire profit or loss which has resulted, or which it is estimated will result, from the complete performance of the contract as is properly attributable to the accounting period having regard to the extent to which the contract was performed therein.

12. Where, in respect of any profits arising from trade or business, relief from income-tax chargeable in the United Kingdom is granted by virtue of arrangements with the Government of any other country, being arrangements which for the time being have effect either—

(a) under Section 18 of the Finance Act, 1923 (which as amended by Section 31 of the Finance Act 1924, and Section 9 of the Finance Act, 1931 provides for the relief of shipping and air transport from double taxation); or

(b) under Section 17 of the Finance Act, 1930 (which provides for the relief of certain agencies from double taxation),

those profits shall not be included in the profits arising from that trade or business, if and so long as the profits or trades or businesses which, by virtue of those arrangements, are relieved from income-tax chargeable in that other country, are relieved from all taxes chargeable in that other country on the profits of trades or businesses.

13. In computing the profits of a local authority from any trade or business carried on by that authority, a deduction shall be made equal to the total amount which is required to be raised by them for sinking fund purposes in connection with that trade or business in respect of the accounting period.

PART II

Provisions for Computing Capital.

1. (1) Subject to the provisions of this part of this Schedule, the amount of the capital employed in a trade or business (so far as it does not consist of money) shall be taken to be—

- (a) so far as it consists of assets acquired by purchase on or after the commencement of the trade or business, the price at which those assets were acquired, subject to the deductions hereafter specified;
- (b) so far as it consists of assets being debts due to the person carrying on the trade or business, the nominal amount of those debts, subject to the said deductions;
- (c) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the trade or business, subject to the said deductions.

(2) The price or value of any assets other than a debt shall be subject to the following deductions—

- (a) a deduction of any sum contributed, directly or indirectly, out of the Consolidated Fund of the United Kingdom or of Northern Ireland, or out of moneys provided by the Parliament of the United Kingdom or the Parliament of Northern Ireland towards the acquisition of the asset;
- (b) any such deductions for wear and tear or for depreciation as are authorised by the Income Tax Acts or part I of this Schedule,
and in the case of a debt, the nominal amount of the debt shall be subject to any deduction which has been allowed in respect thereof for income-tax purposes.

(3) Where the price of any asset has been satisfied otherwise than in cash, the then value of the consideration actually

given for the asset shall be treated as the price at which the asset was acquired.

(4) for the purposes of the provisions of sub-paragraph (2) of this paragraph relating to deductions for wear and tear of depreciation—

- (a) any additional percentage allowed under Section 18 of the Finance Act, 1932, or under that Section as amended by Section 22 of the Finance Act, 1938, or under paragraph 2 of part I of this Schedule shall be treated as part of a deduction for wear and tear ;
- (b) any additional deduction allowable for income-tax purposes by virtue of the proviso to paragraph (2) of Rule 5 of the Rules applicable to Cases I and II of Schedule D, and any deduction allowable for those purposes under Section 18 of the Finance Act, 1919, and any allowance made under paragraph 3 of part I of this Schedule shall be treated as a deduction for depreciation.

2. (1) Any borrowed money and debts shall be deducted, and in particular any debt for income-tax computed by reference to the standard rate or for the national defence contribution or excess profits tax in respect of the trade or business shall be deducted;

Provided that any such debt for income-tax or the national defence contribution or excess profits tax shall for the purposes of this part of this Schedule, be deemed to have become due—

- (a) in the case of income-tax on the first day of January in the year of assessment for which the tax is assessable;
- (b) in the case of the national defence contribution or excess profits tax, on the first day after the end of the chargeable accounting period in respect of which the contribution or tax is assessable ;
notwithstanding that the income-tax, national defence contribution or excess profits tax may not have been assessed until after those dates respectively.

2) Where any debt for the excess profits tax assessable in respect of any period is to be deducted under this

paragraph, the amount thereof shall not be reduced as the result of any relief to be given in respect of a deficiency of profits occurring in any subsequent period, and the amount of any such relief shall be treated as having become an asset of the trade or business on the first day after the end of the chargeable accounting period in which the deficiency occurred.

3. Any investments the income from which is by virtue of the provisions of part I of this Schedule not to be taken into account in computing the profits of the trade or business, and any moneys not required for the purposes of the trade or business, shall be left out of account, but where any investments in the beneficial ownership of the person carrying on the trade or business are so left out of account, the sum (if any) to be deducted under the last preceding paragraph in respect of borrowed money shall be computed as if the principal of the borrowed money were reduced by the value of those investments :

Provided that where the person carrying on the trade or business is not a body corporate, no reduction shall be treated as made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and the interest thereon.

4. For the purpose of ascertaining the average amount of capital employed in a trade or business during any period, the profits or losses made in that period shall, except so far as the country is shown, be deemed —

(a) to have accrued at an even rate throughout the period;
and

(b) to have resulted, as they accrued, in a corresponding increase or decrease, as the case may be, in the capital employed in the trade or business.

Indian Excess Profits Tax.

(Under Act No. X of 1919)

[Passed by the Indian Legislative Council.]

(Received the assent of the Governor General on the 20th March, 1919.)

An Act to impose a duty on excess profits arising out of certain businesses.

WHEREAS it is expedient to impose a duty on excess profits arising out of certain businesses; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called the Excess Profits Duty Act, 1919.

(2) It shall come into force on the 1st April, 1919.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

“accounting period” means the twelve months ending on the 31st March, 1919, or if the accounts of the business have been made up within the said twelve months for the purposes of the Indian Income-tax Act, 1918, in respect of a year ending on any date other than the said 31st March, then the year ending on that other date;

“business” includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture;

“Chief Revenue-authority” means the Board of Revenue or the Financial Commissioner in provinces where those authorities exist, and in any other case such authority as the local Government may declare to be the Chief Revenue-authority for the purposes of this Act;

“prescribed” means prescribed by rules made under this Act.

All expressions used or embodied by reference in this Act which are not hereinbefore defined shall have the same meaning as is attributed to them by the Indian Income-tax Act, 1918.

Application of Act.

3. This Act shall apply to every business (other than the businesses specified in Schedule I) which is, during any part of the accounting period, either carried on in British India by any person or owned or carried on in any place in India by a person ordinarily resident in British India.

Imposition of excess profits duty.

4. Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid on the amount by which the profits in the accounting period exceed the standard profits, a duty (in this Act referred to as "excess profits duty") of an amount equal to fifty per cent. of that excess;

Provided that the amount of the said duty shall not exceed such sum as would reduce the profits in the accounting period below thirty thousand rupees.

Ascertainment of profits in the accounting period.

5. The profits of a business in the accounting period shall, at the option of the person by whom the excess profits duty in respect of that business is payable, be or be deemed to be,—

- (a) the taxable income as finally ascertained for the purposes of the Indian Income-tax Act, 1918, or
- (b) when the accounting period in respect of the business ends on any date other than the 31st March, 1919, and the accounts of the business are made up for an additional period ending on the said 31st March, a sum which bears the same proportion of the taxable income of the total period (such taxable income being ascertained as nearly as may be in accordance with the provisions of the said Act) as a period of one year bears the total period.

Explanation.—The profits in the accounting period shall, notwithstanding any composition in force for the purposes of the said Act, be actually ascertained in accordance with the provisions of that Act.

Standard Profits.

6. (1) The standard profits of a business shall be as follows :—

(a) an amount calculated at the rate of 10 per cent., or at such rate not being less than 10 per cent as may be prescribed, on the capital of the business as existing at the end of the accounting period, in which case the capital of the business shall, for the purposes of this Act, be ascertained in accordance with the provisions of Schedule II ; or

(b) at the option of the person by whom excess profits duty in respect of the business is payable—

(i) if the profits of the business have been assessed in the year 1913 and 1914 for the purposes of the income-tax law then in force—the aggregate of half of the profits so assessed and half of interest, if any, received in those years on securities forming part of the assets of the business ; or

(ii) if the profits of the business have been assessed for the said purposes in the years 1913 and 1914, and in two only of the three years 1915, 1916 and 1917—the aggregate of one-fourth of the profits so assessed and one-fourth of the interest, if any, received in the same four years on securities forming part of the assets of the business ; or

(iii) if the profits of the business have been assessed for the said purposes in all the five years 1913, 1914, 1915, 1916 and 1917—the aggregate of one-fourth of the profits assessed in the years 1913 and 1914 and in such two of the years 1915, 1916 and 1917 as may be selected by the said person and one-fourth of the interest, if any, received in the same four years on securities forming part of the assets of business :

Provided that if the average capital employed in the business in the years adopted for the purpose of determining the standard profits is less or more than the capital so employed at the end of the

accounting period, there shall be made to or from the standard profits an addition or a deduction, as the case may be, which shall bear to the standard profits the same proportion as such increase or decrease of capital bears to the average capital so employed in the years so adopted.

Explanation.—For the purpose of ascertaining the average capital employed, the capital employed in the business in any year shall be deemed to be the capital so employed at the end of that year :

Provided further that if the assessment in any of the said years was made in respect of a period of less than twelve months, that assessment shall, for the purpose of determining the standard profits, be proportionately increased.

- (2) If a composition for income-tax was in force in any of the years 1913, 1914, 1915, 1916 and 1917, such composition shall be deemed for the purposes of clause (b) of sub-section (1) to have been the assessment, and the profits shall be determined in accordance therewith :

Provided that the person by whom excess profits duty in respect of the business is payable shall, notwithstanding any such composition, be entitled to have an assessment of the profits of the business made for the purpose of determining the standard profits, in the same way as the assessment would have been made if no such composition had been agreed upon.

- (3) Each of the years referred to in sub-sections (1) and (2) shall be deemed to be the twelve months commencing with the 1st of April in the year mentioned.

- (4) Notwithstanding anything contained in this Section no increase of capital made after the 31st December, 1918, shall be taken into account in any case, and no such increase before that date shall be taken into account when it appears or to the extent to which it appears that the increase was made with intent to

evade or has the effect of evading the payment of the excess profits duty.

Power to Collector to make allowances for special circumstances.

7. On the application (made in accordance with the provisions of clause (b) of sub-section (2) of Section (11) of any person chargeable with excess profits duty alleging that, owing to any of the following circumstances, namely :—

- (a) any change in the constitution of a partnership of which he is or was a member,
- (b) any postponement or suspension, as a consequence of the present war, of renewals or repairs,
- (c) any exceptional depreciation or obsolescence (including the cost of replacement during the accounting period), due to the present war, of assets employed in the business,
- (d) the provision, in connection with the requirements of the present war, of plant or machinery which will not be required for the purposes of the business after the termination of the war,
- (e) the fact that the assets of the business consist to any material extent of shares in a company the business of which is itself chargeable to excess profits duty,
- (f) the liability of any part of the profits of the business to excess profits duty in the United Kingdom, or
- (g) any special circumstances connected with the nature of the business or the period for which any profits are ascertained or determined,

the provisions of this Act for the calculation of excess profits duty operate unfairly in his case, the Collector may make such allowances in calculating the amount of the duty as seem to him to be necessary to meet the special circumstances, provided that any such allowance shall not reduce the amount of duty payable under the provisions of the Act by more than twenty-five per cent without the previous sanction of the Commissioner.

Appeal to Chief Revenue-authority.

8. (1) If any person who has applied under Section 7 is dissatisfied with the decision of the Collector on his application, he may appeal to the Chief Revenue authority which shall, at the option of such person, either itself decide such appeal or refer it to a Board of Referees to be appointed by the Local Government. The Board shall hear and consider any appeal so referred and shall communicate its decision to the Chief Revenue-authority.

(2) The Chief Revenue-authority and the Board shall be entitled to take into account any of the circumstances specified in Section 7, and to modify the decision of the Collector with reference thereto in such way and to such extent as they may consider just and equitable.

(3) Every Board of Referees appointed under this Section shall consist of three or, in cases which the Local Government considers to be of difficulty or importance, of four persons. When the Board consists of four persons, the Local Government shall appoint one of the members to be Chairman. In any case at least two members of the Board shall be persons not in the service of Government and having in the opinion of the Local Government adequate business experience.

(4) In case of a difference of opinion between the members of the Board, the opinion of the majority shall prevail. When the Board consists of four members and the members are equally divided in opinion, the Chairman shall have a second or casting vote.

(5) The decision of the Chief Revenue-authority on any appeal under this Section or of the Board where an appeal is referred to it shall, notwithstanding any other provision of this Act be final, and shall be deemed to be the basis of assessment in the particular case.

Power of Governor General in Council to deal with hardship in case of a class of business.

9 (1) The Governor General in Council may, on the application made before the 30th June, 1919, of any person alleging that owing to special circumstances to be stated in

the application the provisions of this Act for the calculation of excess profits duty would operate unfairly in the case of any class of business in which such person is engaged, refer such application for the report of a Board of special Referees to be appointed in this behalf by the Governor General in Council.

(2) Every Board appointed under this Section shall consist of four persons, of whom at least two shall be persons not in the service of Government. The Governor General in Council shall appoint one member to be Chairman.

(8) On receipt of the report of the Board, the Governor General in Council shall consider the same and pass thereon such orders as he thinks fit. Any such order may vary the basis or method of assessment in respect of the class of business so reported on, and any variations so made shall be deemed to be modifications of this Act in respect of the matters to which they relate, and this Act shall apply accordingly.

Notice to be given by liquidator that excess profits have been made.

10. Every liquidator of a company which is being wound up at the commencement of this Act or is wound up after the commencement of this Act and which is chargeable to excess profits duty shall before the 31st May 1919, or within two months of the commencement of the winding up, as the case may be, give notice of the fact to Collector.

Returns for the purposes of the Act.

11. (1) The Collector may, for the purposes of this Act, require any person whom he believes to be engaged in any business to which this Act applies, or to have been so engaged during the accounting period or in the year ending on the 31st March, 1912, or on the 31st March in any year thereafter, to furnish him within two months after service upon him of a notice to that effect with such particulars in connection with the business as the Collector may require.

(2) At the time of furnishing such particulars such person shall—

(a) state the method which he desires to be adopted for the purpose of—

(i) ascertaining the profit of the business in the

accounting period under Section 5, and

(ii) determining the standard profits under Section 6, and

(b) make any application which he desires to make under Section 7 for an allowance in the calculation of the amount of the excess profits duty.

(3) Where any person fails, without reasonable cause or excuse, to comply with the provisions of clause (a) of sub-section (2), the Collector shall proceed to ascertain the profits of the accounting period and to determine the standard profits by such method provided in this Act as he thinks fit.

Penalty.

12. If a person fails, without reasonable cause or excuse, to give to the Collector in due time any notice required by Section 10 or to furnish any particulars referred to in Section 11, he shall on conviction by a Magistrate be punishable with fine which may extend to thirty rupees for every day during which the default continues.

Assessment.

13. The amount of excess profits duty to be paid in respect of any business shall be assessed by the Collector, who may in any case where he thinks fit allow the duty to be paid in instalments of such amounts payable at such times as he may direct.

Person liable to be assessed.

14. The duty may be assessed on any person for the time being owning or carrying on the business whether as agent for the owner or otherwise or, where the business has ceased during the accounting period, on the person who owned or so carried on the business immediately before the time at which the business ceased, and where there has been a change of ownership of the business during the accounting period, the Collector shall make the assessment in the prescribed manner.

Application of provisions of Act VII of 1918.

15. The provisions of Sections 20, 21, 22, 23, 24, 26, 27, and of Chapters IV and V and of Sections 42, 45, 46, 47 and 49 to

52 of the Indian Income-tax Act, 1918, shall apply, with such modifications, if any, as may be prescribed, as if the said provisions referred to excess profits duty instead of to income tax, and every officer or authority exercising powers under the said provisions may exercise the like powers under this Act in regard to excess profits duty as he or it exercises in regard to income-tax under the said Act :

Provided that references in the said provisions to the assessee shall be construed as references to a person by whom excess profits duty is payable.

Income-tax papers to be available for the purposes of this Act.

16. Notwithstanding anything contained in the Indian Income-tax Act, 1918, or in any Act repealed thereby, all information contained in any statement or return made or furnished under the provisions of any of the said Acts or obtained or collected for the purposes of any such Act may be used for the purposes of this Act.

Prohibition of and penalty for fictitious transactions.

17. (1) A person shall not for the purposes of avoiding payment of excess profits duty enter into a fictitious or artificial transaction or carry out any fictitious or artificial operation, and if he has entered into any such transaction or carried out any such operation before the commencement of this Act, shall inform the Collector of the nature of the transaction or operation.

Explanation.—For the purposes of this Section an artificial transaction or operation includes every device of whatever nature adopted for the purposes of presenting the accounts of a business in a misleading form or manner with intent to evade or having the effect of evading any obligation imposed by this Act.

(2) If any person acts in contravention of, or fails, without reasonable cause or excuse, to comply with, the provisions of sub-section (1), he shall on conviction by a Magistrate be punishable with fine which may extend to one thousand rupees.

Power to make rules.

18. (1) The Governor General in Council may, by notification

in the Gazette of India, make rules for carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

- (a) the rate to be allowed in respect of any business or class of business for the purposes of clause (a) of sub-section (1) of Section 6 ;
- (b) the procedure to be followed by Boards of Referees appointed under this Act ;
- (c) the basis and method of assessment when there has been a change of ownership during any period which can be selected for the purpose of determining standard profits, or during any subsequent period prior to the commencement of this Act ; and
- (d) the adaptation to excess profits duty of any of the provisions of the Indian Income-tax Act, 1918, which are made applicable to that duty by Section 15.

(3) All rules made under this Section shall have effect as if enacted in this Act.

Excess profits duty and super-tax to be alternately chargeable.

19. Where the profits of any business in the accounting period are chargeable to excess profits duty under the provisions of this Act and to super-tax under the provisions of the Super-tax Act, 1917, then—

- (1) if the amount chargeable as excess profits duty exceeds that chargeable as super-tax, excess profits duty shall alone be charged, and
- (2) if the amount chargeable as super-tax exceeds that chargeable as excess profits duty, super-tax shall alone be charged, and the provisions of this Act and the Super-tax Act 1917, shall be construed accordingly.

Excess profits duty an allowance for the purposes of Act VII of 1918.

20. The amount of excess profits duty paid in respect of any

business shall be allowed as a deduction at the adjustment made in the year ending on the 31st March, 1920, in respect of the profits of that business for the purposes of Section 19 of the Indian Income-tax Act 1918 :

Provided that, if the amount of excess profits duty payable has not been ascertained at the time when the said adjustment is made, the amount by which the income-tax would have been reduced if effect had been given to the deduction shall be deducted from the amount payable for excess profits duty.

SCHEDULE I.

EXCEPTED BUSINESSES

(See Section 3.)

1. Any business the income from which is agricultural income.
2. Offices or employments.
3. Any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on, and in which no capital expenditure is required or only capital expenditure of an amount which is small when compared with the profits which the person carrying on the profession makes :

Provided that the business of any person taking commissions in respect of any transactions or services rendered, or any agent of any description (not being a whole-time officer or servant of the business or a commercial traveller, or an agent whose remuneration consists wholly of a fixed and definite sum not dependent on the amount of business done or any other contingency) shall not be included in this exception.

4. Any business which is liable to pay in respect of the accounting period excess profits duty in the United Kingdom.

5. Any business of which the profits in the accounting period do not exceed thirty thousand rupees.

SCHEDULE II.

ASCERTAINMENT OF CAPITAL.

(See Section 6.)

1. The amount of the capital of a business shall, so far

as it does not consist of money, be taken to be —

- (a) so far as it consists of assets acquired by purchase, the price at which these assets were acquired, subject to any proper deduction for depreciation or for unpaid purchase money,
- (b) so far as it consists of assets being debts due to the business, the nominal amount of those debts subject to any reduction which has been allowed or is allowable in respect of those debts under the Indian Income-tax Act, 1918, and
- (c) so far as it consists of any other assets which have not been acquired by purchase, the value of the assets at the time when they became assets of the business, subject to any proper deduction for depreciation :

Provided that nothing in this provision shall prevent accumulated profits (other than those made in the accounting period) employed in the business being treated as capital.

2. Any borrowed money or trade debts shall be deducted in computing the amount of capital for the purposes of this Act

3. Where any asset has been paid for otherwise than in cash, the cost price of that asset shall be taken to be the value of the consideration at the time the asset was acquired, but where the business has been converted into a company and more than two-thirds of the shares in the company are held by the person who was the owner of the business no value shall be attached to those shares, so far as they are represented by good-will or otherwise than by material assets of the company, unless the Collector in special circumstances otherwise directs. Patents and secret processes shall be deemed to be material assets.

Indian Income-tax Act

(Under Act No. X of 1922)

An Act to consolidate and amend the law relating to
Income-tax and Super-tax.

(As modified up to date.)

WHEREAS it is expedient to consolidate and amend the law relating to Income-tax and Super-tax ; It is hereby enacted as follows : —

Short title, extent and commencement.

1. (1) This Act may be called the Indian Income-tax Act, 1922.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, and applies also, within the Indian States and the tribal areas, to British subjects who are in the service of the Crown or of a local authority established in the exercise of the powers of the Crown Representative or the Central Government in that behalf, and to all other servants of the Crown in the said States and areas.

(3) It shall come into force on the first day of April, 1922.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) “agricultural income” means—

(a) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land-revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such ;

(b) any income derived from such land by—

(i) agriculture, or

(ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in kind to render the produce raised or received by him fit to be taken to market, or

- (iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (ii);
- (c) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator, or the receiver of rent-in-kind, of any land with respect to which, or the produce of which, any operation mentioned in sub-clauses (ii) and (iii) of clause (b) is carried on;

Provided that the building is on or in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent-in-kind by reason of his connection with the land, requires as a dwelling-house, or as a store-house, or other out-building;

(2) "assessee" means a person by whom income-tax is payable;

(3) "Appellate Assistant Commissioner" means a person appointed to be an Appellate Assistant Commissioner of Income-tax under Section 5;

(4) "business" includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture;

(4A) "the Central Board of Revenue" means the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924;

(5) "Commissioner" means a person appointed to be a Commissioner of Income-tax under Section 5;

(6) "company" means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the legislature of a British possession, and includes any foreign association carrying on business in British India whether

incorporated or not, and whether its principal place of business is situate in British India or not, which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act;

(6A) 'dividend' includes—

- (a) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company;
- (b) any distribution by a company of debentures or debenture-stock, to the extent to which the company possesses accumulated profits, whether capitalised or not;
- (c) any distribution made to the shareholders of a company out of accumulated profits of the company on the liquidation of the company :

Provided that only the accumulated profits so distributed which arose during the six previous years of the company preceding the date of liquidation shall be so included; and

- (d) any distribution by a company on the reduction of its capital to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not :

Provided that 'dividend' does not include a distribution in respect of any share issued for full cash consideration which is not entitled in the event of liquidation to participate in the surplus assets, when such distribution is made in accordance with sub-clause (c) or (d).

Explanation.—The words 'accumulated profits', wherever they occur in this clause, shall not include 'capital profit';

(6B) 'firm', 'partner' and 'partnership' have the same meanings respectively as in the Indian Partnership Act, 1932; provided that the expression 'partner' includes any person

who being a minor has been admitted to the benefits of partnership ;

(6C) 'income' includes anything included in 'dividend' as defined in clause (6A) and anything which under *Explanation 2* to sub-section (1) of Section 7 is a profit received in lieu of salary for the purposes of that sub-section and any sum deemed to be profits under the second proviso to clause (vii) of sub-section (2) of Section 10 and the profits of any business of insurance carried on by a mutual insurance company computed in accordance with Rule 9 in the Schedule:

(6D) 'Inspecting Assistant Commissioner' means a person appointed to be an Inspecting Assistant Commissioner of Income-tax under Section 5 ;

(7) '*Income-tax Officer*' means a person appointed to be an Income-tax Officer under section 5;

(8) 'Magistrate' means a Presidency Magistrate or a Magistrate of the first class, or a Magistrate of the second class specially empowered by the Central Government to try offences against this Act;

'person' includes a Hindu undivided family and a local authority ;

(10) 'prescribed' mean prescribed by rules made under this Act;

(11) 'previous year' means in respect of any separate source of income, profits and gains—

(a) the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day on March, then at the option of the assessee the year ending on the day to which his accounts have so been made up :

Provided that where an assessee has once been assessed in respect of a particular source of income, profits and gains, he shall not in respect of that source exercise this option so as to vary the meaning of the expression

'previous year' as then applicable to him except with the consent of the Income-tax Officer and upon such conditions as the Income-tax Officer may think fit; or,

- (b) in the case of any person, business or company or class of person, business or company, such period as may be determined by the Central Board of Revenue or by such authority as the Board may authorise in this behalf; or.
- (c) where a business, profession or vocation has been newly set up in the financial year preceding the year for which assessment is to be made, the period from the date of the setting up of the business, profession or vocation to the 31st day of March next following or to the last day of the period determined under sub-clause (b), or, if the accounts of the assessee are made up to some other date than the 31st day of March and the case is not one for which a period has been determined by the Central Board of Revenue under sub-clause (b), then at the option of the assessee the period from the date of the setting up of the business, profession or vocation to such other date :

Provided that when such other date does not fall between the setting up of the business, profession or vocation and the next following 31st day of March, it shall be deemed that there is no previous year; and

when the assessee is a partner in a firm, 'previous year' in respect of his share of the income, profits and gains of the firm means the previous year as determined for the assessment of the income, profits and gains of the firm;

(12) 'principal officer,' used with reference to a local authority or a company or any other public body or any association, means—

- (a) the secretary, treasure, manager or agent of the authority, company, body or association, or
- (b) any person connected with the authority, company, body or association upon whom the Income-tax Officer

has served a notice of his intention of treating him as the principal officer thereof;

(13) 'public servant' has the same meaning as in the Indian Penal Code;

(14) 'registered firm' means a firm registered under the provisions of Section 26 ;

(15) 'total income' means total amount of income, profits and gains referred to in sub-section (1) of section 4] computed in the manner laid down in this Act, and 'total world income' includes all income, profits and gains wherever accruing or arising except income to which, under the provisions of sub-section (3) of section 4, this Act does not apply; and

(16) 'unregistered firm' means a firm which is not a registered firm.

CHAPTER I

CHARGE OF INCOME-TAX.

Charge of Income-tax.

3. Where any Act of the Central Legislature enacts that income-tax shall be charged for any year at any rate or rates tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or members of the association individually.

Application of Act

4. (1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income profits and gains from whatever source derived which—

- (a) are received or are deemed to be received in British India in such year by or on behalf of such person, or
- (b) if such person is resident in British India during such year,—

- (i) accrue or arise or are deemed to accrue or arise to him in British India during such year, or
 - (ii) accrue or arise to him without British India during such year, or
 - (iii) having accrued or arisen to him without British India before the beginning of such year and after the 1st day of April, 1933, are brought into or received in British India by him during such year; or
- (c) if such person is not resident in British India during such year, accrue or arise or are deemed to accrue or arise to him in British India during such year :

Provided that there shall not be included in any assessment for the year ending on the 31st day of March, 1940, both the amount of the income, profits and gains referred to in sub-clause (ii) of clause (b) and the amount of the income, profits and gains referred to in sub-clause (iii) of clause (b) but only the greater of these two amounts :

Provided further that, in the case of a person not ordinarily resident in British India, income, profits and gains which accrue or arise to him without British India shall not be so included unless they are derived from a business controlled in or a profession or vocation set up in India or unless they are brought into or received in British India by him during such year :

Provided further that if in any year the amount of income accruing or arising without British India exceeds the amount brought into British India in that year, there shall be included in the assessment of the income of that year so much of such excess as does not exceed four thousand five hundred rupees.

Explanation 1.—Income, profits and gains accruing or arising without British India shall not be deemed to be received in or brought into British India within the meaning of this sub-section by reason only of the fact that they are taken into account in a balance-sheet prepared in British India.

Explanation 2.—Income which would be chargeable under the head 'Salaries' if payable in British India and not being pension payable without India shall be deemed to accrue or arise in British India wherever paid if it is earned in British India.

Explanation 3.—A dividend paid without British India shall be deemed to be income accruing and arising in British India to the extent to which it has been paid out of profits subjected to income-tax in British India.

(2) For the purposes of sub-section (1), where a husband is not resident in British India, remittances received by his wife resident in British India out of any part of his income which is not included in his total income shall be deemed to be income accruing in British India to the wife;

(3) Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them:—

- (i) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto.
- (ia) Any income derived from business carried on on behalf of a religious or charitable institution when the income is applied solely to the purposes of the institution and—
 - (a) the business is carried on in the course of the carrying out of primary purpose of the institution or
 - (b) the work in connection with the business is mainly carried on by beneficiaries of the institution;
- (ii) Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes.
- (iii) The income of local authorities except income from a trade or business carried on by the authority so far as that income is not income arising

from the supply of a commodity or service within its own jurisdictional area.

- (iv) Interest on securities which are held by, or are the property of, any Provident Fund to which the Provident Funds Act, 1925, applies, * *
- (v) Any special allowance, benefit or perquisite specifically granted to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit.
- (vi) Any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee.
- (vii) Agricultural income.
- (ix) Any income received by trustees on behalf of a recognised provident fund as defined in clause (a) of Section 58A.

In this sub-section "charitable purpose" includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility, but nothing contained in clause (i), clause (ia) or clause (ii) shall operate to exempt from the provisions of this Act that part of the income of a private religious trust which does not enure for the benefit of the public.

Residence in British India.

4A. For the purposes of this Act—

- (a) any individual is resident in British India in any year if he—
 - (i) is in British India in that year for a period amounting in all to one hundred and eighty-two days or more; or
 - (ii) maintains or has maintained for him a dwelling place in British India for a period or periods amounting in all to one hundred and eighty-two days or more in that year, and is in British India for any time in that year; or

(d) having within the four years preceding that year been in British India for a period of or for periods amounting in all to three hundred and sixty-five days or more, is in British India for any time in that year otherwise than on an occasional or casual visit ;

(b) a Hindu undivided family, firm or other association of persons is resident in British India unless the control and management of its affairs is situated wholly without British India; and

(c) a company is resident in British India in any year (a) if the control and management of its affairs is situated wholly in British India in that year, or (b) if its income arising in British India in that year exceeds its income arising without British India in that year.

Ordinary residence.

4B. For the purposes of this Act—

(a) an individual is 'not ordinarily resident' in British India in any year if he has not been resident in British India in nine out of the ten years preceding that year or if he has not during the seven years preceding that year been in British India for a period of, or for periods amounting in all to, more than two years;

(b) a Hindu undivided family is deemed to be ordinarily resident in British India if its manager is ordinarily resident in British India;

(c) a company, firm or other association of persons is ordinarily resident in British India if it is resident in British India.

CHAPTER II.

Income-tax authorities.

3. (1) There shall be the following classes of Income-tax authorities for the purposes of this Act, namely :—

- (a) the Central Board of Revenue,
- (b) Commissioners of Income-tax,

INDIAN INCOME-TAX ACT OF 1922.

(c) Assistant Commissioners of Income-tax who may be either Appellate Assistant Commissioners of Income-tax or Inspecting Assistant Commissioners of Income-tax,

(d) Income-tax Officers.

(2) The Central Government may appoint a Commissioner of Income-tax for any area specified in the order of appointment, and may appoint Commissioners of Income-tax, not more than three in all, each to discharge, without reference to area, and to the exclusion of any Commissioner appointed for any area, the functions of a Commissioner in respect of any cases or classes of cases assigned to him by the Central Board of Revenue.

(3) The Central Government may appoint for any area as many Appellate or Inspecting Assistant Commissioners of Income-tax and Income-tax Officers as it thinks fit.

(4) Appellate Assistant Commissioners of Income-tax shall be under the direct control of the Central Board of Revenue and shall perform their functions in respect of such persons or classes of persons and of such incomes or classes of income and in respect of such areas as the Central Board of Revenue may direct, and, where two or more Appellate Assistant Commissioners have been appointed for the same area, in accordance with any orders which the Central Board of Revenue may make for the distribution and allocation of the work to be performed.

(5) Inspecting Assistant Commissioners of Income-tax and Income-tax Officers shall perform their functions in respect of such persons or classes of persons and of such incomes or classes of income and in respect of such areas as the Commissioner of Income-tax may direct, and, where two or more Inspecting Assistant Commissioners of Income-tax or Income-tax Officers have been appointed for the same area, in accordance with any orders which the Commissioner of Income-tax may make for the distribution and allocation of the work to be performed. The Commissioner may, with the previous approval of the Central Board of Revenue, by general or special order in writing, direct that the powers conferred on the Income-tax

Officer and the Appellate Assistant Commissioner by or under this Act shall, in respect of any specified case or class of cases, be exercised by the Inspecting Assistant Commissioner and the Commissioner, respectively, and, for the purposes of any case in respect of which such order applies, references in this Act or in any rules made hereunder to the Income-tax Officer and the Appellate Assistant Commissioner shall be deemed to be references to the Inspecting Assistant Commissioner and the Commissioner, respectively.

(6) The Central Board of Revenue may, by notification in the official Gazette, empower Commissioners of Income-tax, Appellate or Inspecting Assistant Commissioners of Income-tax and Income-tax Officers to perform such functions in respect of such classes of persons or such classes of income and for such area as may be specified in the notification, and thereupon the functions so specified shall cease within the specified area to be performed in respect of the specified classes of persons or classes of income by the other authorities appointed under sub-sections (2) and (3).

(7) Assistant Commissioners of Income-tax and Income-tax Officers shall, for the purposes of this Act, be subordinate to the Commissioner of Income-tax for the area in which they perform their functions, or where they perform functions assigned to them by a Commissioner of Income-tax appointed without reference to area, to the Commissioner.

(8) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue :

Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions.

CHAPTER III.

TAXABLE INCOME.

Heads of income chargeable to income-tax.

6. Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to

income-tax in the manner hereinafter appearing, namely:—

- (i) Salaries.
- (ii) Interest on securities.
- (iii) Income from property.
- (iv) Profits and gains of business, profession or vocation.
- (v) Income from other sources.

Salaries.

7. (1) The tax shall be payable by an assessee under the head "Salaries" in respect of any salary or wages, any annuity, pension or gratuity, and any fees, commissions, perquisites or profits * * * in lieu of, or in addition to, any salary or wages, which are due to him from, whether paid or not, or are paid by or on behalf of, the Crown, a local authority, a company, or any other public body or association, or any private employer; and for the purposes of this sub-section advances by way of loan or otherwise of income chargeable under this head shall be deemed to be salary due on the date when the advance is received.

Provided that the tax shall not be payable in respect of any sum which the assessee by the conditions of his employment is required to spend out of his remuneration, wholly, necessarily and exclusively in the performance of his duties;

Provided further that the tax shall not be payable in respect of any sum deducted from the salary payable by or on behalf of the Crown to any individual, being a sum deducted in accordance with the conditions of his service, for the purpose of securing to him a deferred annuity or of making provision for his wife or children, provided that the sum so deducted shall not exceed one-sixth of the salary;

Provided further that where tax is deductible at the source under Section 18, the assessee shall not be called upon to pay the tax himself unless he has received the salary without such deduction;

Explanation (1)—The right of a person to occupy free of rent as a place of residence any premises provided by his employer is a perquisite for the purposes of this sub-section.

*Explanation (2).—*A payment due to or received by an assessee from an employer or former employer or from a provident or other fund at or in connection with the termination of his employment, whether or not the employment is then terminated or to be terminated, is to the extent to which it does not consist of contributions by the assessee or interest on such contributions a profit received in lieu of salary for the purposes of this sub-section, unless the payment is made solely as compensation for loss of employment and not by way of remuneration for past services :

Provided that nothing herein contained shall render liable to income-tax any payment from a provident fund to which the Provident Funds Act, 1925, applies or any payment from a recognised provident fund within the meaning of Chapter IXA if such payment is exempted from payment of income-tax under the provisions of Chapter IXA, or any payment from an approved superannuation fund within the meaning of Chapter IXB made on the death of a beneficiary or in lieu of or in commutation of an annuity, or by way of refund of contributions on the death of a beneficiary or on his leaving the employment in connection with which the fund is established.

(2) Any income which would be chargeable under this head if paid in British India shall be deemed to be so chargeable if paid to a British subject or any servant of His Majesty in any part of India by or on behalf of the Crown or by a local authority established in the exercise of the powers of the Crown Representative or the Central Government in that behalf.

Interest on securities.

8. The tax shall be payable by an assessee under the head 'Interest on securities' in respect of the interest receivable by him on any security of the Central Government or of a Provincial Government, or on debentures or other securities for money issued by or on behalf of a local authority or a company :

Provided that no income-tax shall be payable under this Section by the assessee in respect of any sum deducted from such interest by way of commission by a banker realising such

interest on behalf of the assessee or in respect of any interest payable on money borrowed for the purpose of investment in the securities by the assessee except interest chargeable under this Act which is payable without British India, not being interest on a loan issued for public subscription before the 1st day of April, 1938, unless in respect of interest which is so chargeable tax has been paid or deducted under Section 18, or unless there is a person in British India who may be appointed an agent under Section 43 in respect of such interest:

Provided further that no income-tax shall be payable on the interest receivable on any security of the Central Government issued or declared to be income-tax free ;

Provided further that the income-tax payable on the interest receivable on any security of a Provincial Government issued income-tax free shall be payable by the Provincial Government.

Property.

9. (1) The tax shall be payable by an assessee under the head "Income from Property" in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of any business, profession or vocation carried on by him the profits of which are assessable to tax subject to the following allowances, namely :—

- (i) where the property is in the occupation of the owner, or where it is let to a tenant and the owner has undertaken to bear the cost of repairs, a sum equal to one-sixth of such value ;
- (ii) where the property is in the occupation of a tenant who has undertaken to bear the cost of repairs, the difference between such value and the rent paid by the tenant up to but not exceeding one-sixth of such value ;
- (iii) the amount of any annual premium paid to insure the property against risk of damage or destruction ;

- (iv) where the property is subject to a mortgage or other capital charge, the amount of any interest on such mortgage or charge, where the property is subject to an annual charge not being a capital charge, the amount of such charge; where the property is subject to a ground rent, the amount of such ground rent; and where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital :

Provided that no allowance shall be made in respect of any interest or annual charge payable without British India and chargeable under this Act, not being interest on a loan issued for public subscription before the 1st day of April, 1938, except interest or a charge on which tax has been paid or from which tax has been deducted under Section 18 or in respect of which there is an agent for the payee in British India who may be assessed under Section 43 ;

- (v) any sums paid on account of land revenue in respect of the property ;
- (vi) in respect of collection charges, a sum not exceeding the prescribed maximum.
- (vii) in respect of vacancies, that part of the net annual value, after deducting the foregoing allowances, which is proportional to the period during which the property is wholly unoccupied or, where the property is let out in parts, that portion of the net annual value, after deducting the foregoing allowances appropriate to any vacant part, which is proportional to the period during which such part is wholly unoccupied ;

(2) For the purposes of this Section, the expression "annual value" shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year :

Provided that, where the property is in the occupation of the owner for the purposes of his own residence, such sum shall

for the purposes of this Section, be deemed not to exceed ten per cent of the total income of the owner.

(3) Where property is owned by two or more persons and their respective shares are definite and ascertainable, such persons shall not in respect of such property be assessed as an association of persons, but the share of each such person in the income from the property as computed in accordance with this Section shall be included in his total income.

Business.

10. (1) The tax shall be payable by an assessee under the head "Profits and gains of business, profession or vocation" in respect of the profit or gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely:—

- (i) any rent paid for the premises in which such business, profession or vocation is carried on, provided that when any substantial part of the premises is used as a dwelling-house by the assessee, the allowance under this clause shall be such sum as the Income-tax Officer may determine having regard to the proportional annual value of the part so used;
- (ii) in respect of repairs, where the assessee is the tenant only of the premises, and has undertaken to bear the cost of such repairs, the amount paid on account thereof, provided that, if any substantial part of the premises is used by the assessee as a dwelling-house, a proportional part only of such amount shall be allowed;
- (iii) in respect of capital borrowed for the purposes of the business, profession or vocation * * * the amount of the interest paid;

Provided that no allowance shall be made under this clause in any case for any interest chargeable under this Act which is payable without British India, not being interest on a loan issued for public subscription

before the 1st day of April, 1938, except interest on which tax has been paid or from which tax has been deducted under Section 18 or in respect of which there is an agent in British India who may be assessed under Section 43 or, in the case of a firm, for any interest paid to a partner of the firm ;

*Explanation:—*Recurring subscriptions paid periodically by shareholders or subscribers in such Mutual Benefit Societies as may be prescribed, shall be deemed to be capital borrowed within the meaning of this clause :

- (iv) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, used for the purposes of the business, profession or vocation, the amount of any premium paid ;
- (v) in respect of current repairs to such buildings, machinery, plant, or furniture, the amount paid on account thereof ;
- (vi) in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed :

Provided that—

- (a) the prescribed particulars have been duly furnished;
- (b) where full effect cannot be given to any such allowance in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or if there is no such allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years; and

- (c) the aggregate of all such allowances made under this Act or any Act repealed hereby, or under the Indian Income-tax Act, 1886, shall, in no case, exceed the original cost to the assessee of the buildings, machinery, plant, or furniture, as the case may be;
- (vii) in respect of any machinery or plant which, in consequence of its having become obsolete, has been sold or discarded, the difference between the original cost to the assessee of the machinery or plant as reduced by the aggregate of the allowances made in respect of depreciation under clause (vi), or any Act repealed hereby, or the Indian Income-tax Act, 1886, and the amount for which the machinery or plant is actually sold, or its scrap value;
- (viii) in respect of animals which have been used for the purposes of the business, profession or vocation otherwise than as stock in trade and have died or or become permanently useless for such purposes, the difference between the original cost to the assessee of the animals and the amount, if any, realised in respect of the carcasses or animals;
- (ix) any sums paid on account of land-revenue, local rates or municipal taxes in respect of such part of the premises as is used for the purposes of the business, profession or vocation;
- (x) any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission;

Provided that the amount of the bonus or commission is of a reasonable amount with reference to—

- (a) the pay of the employee and the conditions of his service.
- b) the profits of the business, profession or vocation for the year in question; and
- (c) the general practice in similar businesses, professions or vocations;

- (xi) when the assessee's accounts in respect of any part of his business, profession or vocation are not kept on the cash basis, such sum, in respect of bad and doubtful debts due to the assessee in respect of that part of his business, profession or vocation, and in the case of an assessee carrying on a banking or money-lending business, such sum in respect of loans made in the ordinary course of such business as the Income-tax Officer may estimate to be irrecoverable but not exceeding the amount actually written off as irrecoverable in the books of the assessee :

Provided that if the amount ultimately recovered on any such debt or loan is greater than the difference between the whole debt or loan and the amount so allowed, the excess shall be deemed to be a profit of the year in which it is recovered, and if less, the deficiency shall be deemed to be a business expense of that year ;

- (xii) any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation.

(3) Where any building, machinery, plant or furniture in respect of which any allowance is due under clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (2) is not wholly used for the purposes of the business, profession or vocation, the allowance shall be restricted to the fair proportional part of the amount which would be allowable if such building, machinery, plant or furniture was wholly so used.

(4) Nothing in clause (ix) or clause (xii) of sub-section (2) shall be deemed to authorise the allowance of any sum paid on account of any cess, rate or tax levied on the profits or gains of any business, profession or vocation or assessed at a proportion of or otherwise on the basis of any such profits or gains ; and nothing in clause (xii) of sub-section (2) shall be deemed to authorise—

- (a) any allowance in respect of a payment which is chargeable under the head 'Salaries' if it is payable without British India and tax has not been paid thereon nor deducted therefrom under Section 18 or ;

- (b) any allowance in respect of any payment by way of interest, salary, commission or remuneration made by a firm to any partner of the firm; or
- (c) any allowance in respect of a payment to a provident or other fund established for the benefit of employees unless the employer has made effective arrangements to secure that tax shall be deducted at source from any payments made from the fund which are taxable under the head 'Salaries'.

(5) In sub-section (2), 'paid' means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under this Section; 'plant' includes vehicles, books, scientific apparatus and surgical equipment purchased for the purposes of the business, profession or vocation; and 'written down value' means—

- (a) in the case of assets acquired in the previous year, the actual cost to the assessee;
- (b) in the case of assets acquired before the previous year but after the commencement of the Indian Income-tax (Amendment) Act, 1939, the actual cost to the assessee less all depreciation allowable to him under this Section;
- (c) in the case of assets acquired before the commencement of the Indian Income-tax (Amendment) Act, 1939, the actual cost to the assessee less for each financial year since acquisition the amount of depreciation applicable to the assets at the rates in force for each such year since the 1st day of April, 1922, and at the rates in force on the 1st day of April, 1922, for each such year prior to that date:

Provided that where the provisions of the proviso to sub-section (2) of Section 26 are applicable, the actual cost to the assessee referred to in clauses (a), (b) and (c) shall be the actual cost to the person succeeded in the business, profession or vocation;

Provided further that there shall not be so deducted from the actual cost any depreciation allowance or part of any

depreciation allowance which was due for a year which ended prior to the 1st day of April, 1939, but to which full effect was not given owing to the absence of profits or gains chargeable for that year, or owing to the profits or gains so chargeable being less than the allowance.

(6) A trade, professional or similar association performing specific services for its members for remuneration definitely related to those services shall be deemed for the purpose of this Section to carry on business in respect of those services, and the profits and gains therefrom shall be liable to tax accordingly.

(7) Notwithstanding anything to the contrary contained in Section, 8, 9, 10, 12 or 18, the profits and gains of any business of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the Schedule to this Act.

11. *Professional earnings.* —Omitted by Section 12 of the *Indian Income-tax (Amendment) Act, 1939 (7 of 1939)*.

Other Sources.

12. (1) The tax shall be payable by an assessee under the head "Income from other sources" in respect of income, profits and gains of every kind which may be included in his total income (if not included under any of the preceding heads).

(2) Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of—

- (a) any personal expenses of the assessee, or
- (b) any interest chargeable under this Act which is payable without British India, not being interest on a loan issued for public subscription before the 1st day of April, 1938, or not being interest on which tax has been paid or from which tax has been deducted under Section 18, or
- (c) any payment which is chargeable under the head 'Salaries', if it is payable without British India and tax has not been paid thereon nor deducted therefrom under Section 18.

(3) where an assessee lets on hire machinery, plant or furniture belonging to him he shall be entitled to allowances in accordance with the provisions of clauses (iv), (v), (vi) and (vii) of sub-section (2) of Section 10.

Managing Agency Commission

12A. Where a managing agent of a company is liable under an agreement made for adequate consideration to share managing agency commission with a third party or parties, the said agent and the said party or parties shall file a declaration showing the proportion in which such commission is shared between them, and on proof to the satisfaction of the Income-tax Officer of the facts contained in such declaration such agent and each such party shall be chargeable only on the share to which such agent or party is entitled under the agreement.

Method of accounting.

13. Income, profits and gains shall be computed, for the purpose of Section 10 and 12, in accordance with the method of accounting regularly employed by the assessee :

Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income, tax Officer may determine.

Exemptions of a general nature.

11. (1) The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family.

(2) The tax shall not be payable by an assessee—

(a) if a partner of an unregistered firm, in respect of any portion of his share in the profits and gains of the firm computed in the manner laid down in clause (b) of sub-section (1) of Section 16 on which the tax has already been paid by the firm ; or

(b) if a member of an association of persons other than a Hindu undivided family, a company or a firm,

in respect of any portion of the amount which he is entitled to receive from the association on which the tax has already been paid by the association.

Exemption in the case of life insurances.

15. (1) The tax shall not be payable in respect of any sums paid by an assessee to effect an insurance on the life of the assessee or on the life of a wife or husband of the assessee or in respect of a contract for a deferred annuity on the life of the assessee or on the life of a wife or husband of the assessee, or as a contribution to any Provident Fund to which the Provident Funds Act, 1925, applies.

(2) Where the assessee is a Hindu undivided family, there shall be exempted under sub-section (1) any sums paid to effect an insurance on the life of any male member of the family or of the wife of any such member.

(3) The aggregate of any sums exempted under this Section shall not, together with any sums exempted under the second proviso to sub-section (1) of Section 7 and any sums exempted under sub-section (1) of Section 58F, exceed in the case of an individual, one-sixth of the total income of the assessee, or six thousand rupees, whichever is less, and in the case of a Hindu undivided family, one-sixth of the total income of the assessee, or twelve thousand rupees, whichever is less.

Exemptions and exclusions determining the total income.

16. (1) In computing the total income of an assessee—

(a) any sums exempted under the second proviso to sub-section (1) of Section 7, the second and third provisos to Section 8, sub-section (2) of Section 14 and Section 15 shall be included ;

(b) when the assessee is a partner of a firm, then, whether the firm has made a profit or a loss, his share (whether a net profit or a net loss) shall be taken to be any salary, interest, commission or other remuneration payable to him by the firm in respect of the previous year increased or decreased respectively by his share in the balance of the profit or loss of the firm after the deduction of any interest, salary,

commission or other remuneration payable to any partner in respect of the previous year ;

Provided that if his share so computed is a loss, such loss may be set off or carried forward and set off in accordance with the provisions of Section 24 ;

(c) all income arising to any person by virtue of a settlement or disposition whether revocable or not, and whether effected before or after the commencement of the Indian Income-tax (Amendment) Act, 1939, from assets remaining the property of the settlor or disponent, shall be deemed to be income of the settlor or disponent, and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor :

Provided that for the purposes of this clause a settlement, disposition or transfer shall be deemed to be revocable if it contains any provision for the retransfer directly or indirectly of the income or assets to the settlor, disponent or transferor, or in any way gives the settlor, disponent or transferor a right to reassume power directly or indirectly over the income or assets ;

Provided further that the expression 'settlement or disposition' shall for the purposes of this clause include any disposition, trust, covenant, agreement, or arrangement, and the expression 'settlor or disponent' in relation to a settlement or disposition shall include any person by whom the settlement or disposition was made ;

Provided further that this clause shall not apply to any income arising to any person by virtue of a settlement or disposition which is not revocable for a period exceeding six years or during the life-time of the person and from which income the settlor or disponent derives no direct or indirect benefit but that the settlor shall be liable to be assessed on the said income as and when the power to revoke arises to him.

(2) For the purposes of inclusion in the total income of an assessee any dividend shall be deemed to be income of the previous year in which it is paid, credited or distributed or deemed to have been paid, credited or distributed to him, and shall be increased by the amount of income-tax (but not super-tax) payable thereon calculated at the rate applicable to the total income of a company for the financial year in which the dividend is paid, credited or distributed or deemed to have been paid, credited or distributed :

Provided that when any portion of the profits and gains of the company out of which such dividend has been paid, credited or distributed or deemed to have been paid, credited or distributed was not liable to income-tax in the hands of the company, the income-tax to be added under this Section shall be calculated upon only such proportion of the dividend as the amount of the profits and gains of the company liable to income-tax bears to the total profits and gains of the company.

(3) In computing the total income of any individual for the purpose of assessment, there shall be included—

(a) so much of the income of a wife or minor child of such individual as arises directly or indirectly—

- (i) from the membership of the wife in a firm of which her husband is a partner ;
- (ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner ;
- (iii) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart ; or
- (iv) from assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual otherwise than for adequate consideration ; and

(b) so much of the income of any person or association of persons as arises from assets transferred otherwise than for adequate consideration to the person or

as association by such individual for the benefit of his wife or a minor child or both.

Determination of tax payable in certain special cases.

17. (1) Where a person is not resident in British India, and is a British subject as defined in Section 27 of the British Nationality and Status of Aliens Act, 1914, or a subject of a State in India or Burma, the tax, including super-tax, payable by him or on his behalf on his total income shall be an amount bearing to the total amount of the tax including super-tax which would have been payable on his total world income had it been his total income the same proportion as his total income bears to his total world income; and in the case of any other non-resident person, the income-tax payable by him or on his behalf on his total income shall be at the maximum rate and the super-tax payable thereon shall be an amount bearing to the total amount of super-tax which would have been payable on his total world income had it been his total income the same proportion as his total income bears to his total world income.

(2) Where there is included in the total income of any assessee any income (including income from a share in an unregistered firm, if assessed as such) exempted from tax by or under the provisions of this Act, the income-tax excluding super-tax payable by the assessee shall be an amount bearing to the total amount of the income-tax excluding super-tax which would have been payable on the total income had no part of it been exempted the same proportion as the unexempted portion of the total income bears to the total income.

CHAPTER IV.

DEDUCTIONS AND ASSESSMENT.

Payment by deduction at source.

18 (2) Any person responsible for paying any income chargeable under the head 'Salaries' shall, at the time of payment, deduct income-tax and super-tax on the amount payable at a rate representing the average of the rates applicable to the estimated total income of the assessee under this head:

Provided that such person may at the time of making any deduction, increase or reduce the amount to be deducted: under

this sub-section for the purpose of adjusting any excess or deficiency arising out of any previous deduction or failure to deduct.-

(2A) Notwithstanding anything hereinbefore contained for the purpose of making the deduction under sub-section (2), there shall be included in the amount payable any income chargeable under the head "Salaries" which is payable to the assessee out of India by or on behalf of the Crown, and the value in rupees of such income shall be calculated at the prescribed rate of exchange.

(2B) Any person responsible for paying any income chargeable under the head "Salaries" to a person not resident in British India shall at the time of payment deduct income-tax at the maximum rate and also super-tax at the rate or rates applicable to the estimated income of the assessee under this head.

(3) The person responsible for paying any income chargeable under the head "Interest on securities" shall, unless otherwise prescribed in the case of any security of the Central Government, at the time of payment, deduct income-tax but not super-tax on the amount of the interest payable at the maximum rate.

Provided that where the Income-tax Officer gives a certificate in writing (which certificate he shall give in every proper case on the application of the assessee) that to the best of his belief the total income or the total world income of a recipient will be less than the minimum liable to income-tax or will be liable to a rate of income-tax less than the maximum rate, the person responsible for paying any income referred to in this sub-section or in sub-section (2B), as the case may be to such recipient shall, until such certificate is cancelled by the Income-tax Officer, pay the income without deduction or deduct the tax at such less rate, as the case may be.

(3A) Any person responsible for paying to a person not resident in British India any interest not being 'Interest on Securities', or any other sum chargeable under the provisions of this Act, shall, at the time of payment, unless he is himself

liable to pay income-tax thereon as an agent, deduct income-tax at the maximum rate.

(3B) Where the Income-tax Officer has reason to believe that the total world income of any person residing out of British India to whom any interest not being "Interest on Securities" or any other sum chargeable under this Act is payable, will in any year exceed the maximum amount which is not chargeable with super-tax under the law for the time being in force, he may by order in writing, require the person responsible for making such payments to such person to deduct at the time of payment super-tax at the rates determined by the Income-tax Officer to be applicable to the total world income of such person in that year.

(3C) Where the person responsible for paying any interest not being "Interest on Securities" or any other sum chargeable under this Act, to any person makes to that person in any year payments exceeding in the aggregate the maximum amount which is not chargeable with super-tax under the law for the time being in force, the person responsible for making such payments shall if he has not reason to believe that the recipient is resident in British India and no order under sub-section (3B) has been received in respect of such recipient, deduct at the time of payment super-tax on the amount by which the total amount of such payments exceeds the maximum amount not chargeable with super-tax at the rate applicable to such excess.

(3D) Where the Income-tax Officer has reason to believe that any person, who is a shareholder in a company, is resident out of British India and that the total world income of such person will in any year exceed the maximum amount which is not chargeable to super-tax under the law for the time being in force, he may, by order in writing, require the principal officer of the company to deduct at the time of payment of any dividend from the company to the shareholder in that year super-tax at such rate as the Income-tax Officer may determine as being the rate applicable in respect of the income of the shareholder in that year.

(3E) If in any year the amount of any dividend or the aggregate amount of any dividends paid to any share-holder by a company (together with the amount of any income-tax payable by the company in respect thereof) exceeds the maximum amount of the total income of a person which is not chargeable to super-tax under the law for the time being in force, and the principal officer of the company has no reason to believe that the shareholder is resident in British India, and no order under sub-section (3D) has been received in respect of such shareholder by the principal officer from the Income-tax Officer, the principal officer shall at the time of payment deduct super-tax on the amount of such excess at the rate which would be applicable under the law for the time being in force if the amount of such dividend or dividends (together with the amount of such income-tax as aforesaid) constituted the whole total income of the shareholder.

(4) All sums deducted in accordance with the provisions of this Section shall, for the purpose of computing the income of an assessee, be deemed to be income received.

(5) Any deduction made in accordance with the provisions of this Section and any sum by which a dividend has been increased under sub-section (2) of Section 16 shall be treated as a payment of income-tax or super-tax on behalf of the person from whose income the deduction was made, or of the owner of the security or of the share-holder, as the case may be, and credit shall be given to him therefor in the assessment, if any, made for the following year under this Act :

Provided that, if such person or such owner obtains, in accordance with the provisions of this Act, a refund of any portion of the tax so deducted, no credit shall be given for the amount of refund.

Provided further that where such person or owner is a person whose income is included under the provisions of clause (c) of sub-section (1) or sub-section (8) of Section 16, Section 44-D; or Section 44-E. in the total income of another person such other person shall be deemed to be the person or owner on whose behalf payment has been made and to whom credit shall be given in the assessment for the following year.

(6) All sums deducted in accordance with the provisions of this Section shall be paid within the prescribed time by the person making the deduction to the credit of the Central Government or as the Central Board of Revenue directs.

(7) If any such person does not deduct or after deducting fails to pay the tax as required by or under this Section, he, and in the cases specified in sub-sections (3D) and (3E) the company of which he is the principal officer shall, without prejudice to any other consequences which he or it may incur be deemed to be an assessee in default in respect of the tax :

Provided that the Income-tax Officer shall not make a direction under sub-section (1) of Section 46 for the recovery of any penalty from such person unless satisfied that such person has wilfully failed to deduct and pay the tax.

(8) The power to levy by deduction under this Section shall be without prejudice to any other mode of recovery.

(9) Every person deducting income-tax or super-tax in accordance with the provisions of sub-sections (3), (3A), (3B), (3C), (3D) or (3E), shall, at the time of payment of the sum from which tax has been deducted, furnish to the person to whom such payment is made a certificate to the effect that income-tax or super-tax has been deducted, and specifying the amount so deducted, the rate at which the tax has been deducted, and such other particulars as may be prescribed.

Payment in other cases

19. In the case of income in respect of which provision is not made under Section 18 for deduction of income-tax at the time of payment, and in any case where income-tax has not been deducted in accordance with the provisions of Section 18, income-tax shall be payable by the assessee direct.

Supply of information regarding dividends.

19A. The principal officer of every company shall, on or before the 15th day of June in each year, furnish to the prescribed officer a return in the prescribed form and verified in the prescribed manner of the names and of the addresses, as entered in the register of shareholders maintained by the company, of the shareholders to whom a dividend or aggregate

dividends exceeding such amount as may be prescribed in this behalf has or have been distributed during the preceding year and of the amount so distributed to each such shareholder.

Certificate by company to shareholders receiving dividends.

20. The principal officer of every company shall, at the time of distribution of dividends, furnish to every person receiving a dividend certificate to the effect that the company has paid or will pay income-tax on the profits which are being distributed, and specifying such other particulars as may be prescribed.

Supply of information regarding interest.

20A. The person responsible for paying any interest not being "Interest on securities" shall, on or before the fifteenth day of June in each year, furnish to the prescribed officer a return in the prescribed form and verified in the prescribed manner of the names and addresses of all persons to whom during the previous financial year he has paid interest or aggregate interest exceeding such amount not being less than four hundred rupees as may be prescribed in this behalf, together with the amount paid to each such person.

Annual return.

21. The prescribed person in the case of every Government office, and the principal officer or the prescribed person in the case of every local authority, company or other public body or association, and every private employer shall prepare, and, within thirty days from the 31st day of March in each year, deliver or cause to be delivered to the Income-tax Officer in the prescribed form and verified in the prescribed manner, a return in writing showing—

- (a) the name and, so far as it is known, the address, of every person who was receiving on the said 31st day of March, or has received or to whom was due during the year ending on that date, from the authority, company, body, association or private employer, as the case may be, any income chargeable under the head "Salaries" of such amount as may be prescribed :

(b) the amount of the income so received or so due by each such person, and the time or times at which the same was paid or due, as the case may be :

(c) the amount deducted in respect of income-tax and super-tax from the income of each person.

Return of income.

22. (1) The Income-tax Officer shall, on or before the 1st day of May in each year, give notice, by publication in the press and by publication in the prescribed manner, requiring every person whose total income during the previous year exceeded the maximum amount which is not chargeable to income-tax to furnish, within such period not being less than sixty days as may be specified in the notice, a return, in the prescribed form and verified in the prescribed manner, setting forth (along with such other particulars as may be required by the notice) his total income and total world income during that year :

Provided that the Income-tax Officer may in his discretion extend the date for the delivery of the return in the case of any person or class of persons :

(2) In the case of any person whose total income is, in the Income-tax Officer's opinion, of such an amount as to render such person liable to income-tax, the Income-tax Officer may serve a notice upon him requiring him to furnish, within such period, not being less than thirty days, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) his total income and total world income during the previous year :

Provided that the Income-tax Officer may in his discretion extend the date for the delivery of the return ;

(3) If any person has not furnished a return within the time allowed by or under sub-section (1) or sub-section (2), or having furnished a return under either of those sub-sections, discovers any omission or wrong statement therein, he may furnish a return or a revised return, as the case may be at any time before the assessment is made.

(4) The Income-tax Officer may serve on any person who has made a return under sub-section (1) or upon whom a notice has been served under sub-section (2) a notice requiring him, on a date to be therein specified, to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require :

Provided that the Income-tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year.

(5) The prescribed form of the returns referred to in sub-sections (1) and (2) shall, in the case of an assessee engaged in any business, profession or vocation, require him to furnish particulars of the location and style of the principal place wherein he carries on the business, profession or vocation and of any branches thereof, the names and addresses of his partners, if any, in such business, profession or vocation and the extent of the share of the assessee and the shares of all such partners in the profits of the business, profession or vocation and any branches thereof.

Assessment

23. (1) If the Income-tax Officer is satisfied without requiring the presence of the assessee or the production by him of any evidence that a return made under Section 22 is correct and complete, he shall assess the total income of the assessee, and shall determine the sum payable by him on the basis of such return.

(2) If the Income-tax Officer is satisfied without requiring the presence of the person who made the return or the production of evidence that a return made under Section 22 is correct and complete, he shall serve on such person, a notice requiring him, on a date to be therein specified, either to attend at the Income-tax Officer's office or to produce, or to cause to be there produced, any evidence on which such person may rely in support of the return.

(3) On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on

specified points, shall, by order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment.

(4) If any person fails to make the return required by any notice given under sub-section (2) of Section 22 and has not made a return or a revised return under sub-section (3) of the same Section or fails to comply with all the terms of a notice issued under sub-section (4) of the same Section or, having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this Section, the Income-tax Officer shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment and, in the case of a firm may refuse to register it or may cancel its registration if it is already registered:

Provided that the registration of a firm shall not be cancelled until fourteen days have elapsed from the issue of a notice by the Income-tax Officer to the firm intimating his intention to cancel its registration.

(5) Notwithstanding anything contained in the foregoing sub-sections, when the assessee is a firm and the total income of the firm has been assessed under sub-section (1), sub-section (3) or sub-section (4), as the case may be,—

(a) in the case of a registered firm, the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined :

Provided that if such share of any partner is a loss it shall be set off against his other income or carried forward and set off in accordance with the provisions of Section 24 :

Provided further that when any of such partners is a person not resident in British India, his share of the income, profits and gains of the firm shall be assessed on the firm at the rates which would be applicable if

it were assessed on him personally, and the sum so determined as payable shall be paid by the firm; and

- (b) in the case of an unregistered firm, the Income-tax Officer may instead of determining the sum payable by the firm itself proceed in the manner laid down in clause (a) as applicable to a registered firm, if, in his opinion, the aggregate amount of the tax including super-tax, if any, payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm.

Power to assess individual members of certain companies.

23A. (1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company in general meeting increased by any income-tax payable thereon are less than sixty per cent of the assessable income of the company of that previous year, he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profit made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting aforesaid, and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income :

Provided that when the reserves representing accumulations of past profits which have not been the subject of

an order under this sub-section exceed the paid up capital of the company, together with any loan capital which is the property of the shareholders, or the actual cost of the fixed assets of the company whichever of these is greater, this Section shall apply as if instead of the words 'sixty per cent of the assessable income' the words 'one hundred per cent of the assessable income' were substituted :

Provided further that no order under this sub-section shall be made where the company has distributed not less than fifty-five percent. of the assessable income of the company, unless the company, on receipt of a notice from the Income-tax Officer that he proposes to make such an order, fails to make within three months of the receipt of such notice a further distribution of its profits and gains so that the total distribution made is not less than sixty per cent. of the assessable income of the company of the previous year concerned :

Provided further that this sub-section shall not apply to any company in which the public are substantially interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof ;

*Explanation :—*For the purpose of this sub-section,—

a company shall be deemed to be a company in which the public are substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend, whether with or without a further right to participate in profits) carrying not less than twenty-five per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the previous year beneficially held by, the public (not including a company to which the provisions of this sub-section apply), and if any such shares have in the course of such previous

year been the subject of dealings in any stock exchange in British India or are in fact freely transferable by the holders to other members of the public.

(2) The Inspecting Assistant Commissioner shall not give his approval to any order proposed to be passed by the Income-tax Officer under this Section* until he has given the company concerned an opportunity of being heard.

(3) (ii) Where the proportionate share of any member of a company in the undistributed profits and gains of the company has been included in his total income under the provisions of sub-section (1) the tax payable in respect thereof shall be recovered from the company if it cannot be recovered from such member.

(iii) Where tax is recoverable from a company under this sub-section, a notice of demand shall be served upon it in the prescribed form showing the sum so payable, and such company shall be deemed to be the assessee in respect of such sum, for the purposes of Chapter VI.

(4) Where tax has been paid in respect of any undistributed profits and gains of a company under this Section, and such profits and gains are subsequently distributed in any year, the proportionate share therein of any member of the company shall be excluded in computing his total income of that year.

(5) When a company is a shareholder deemed under sub-section (1) to have received a dividend, the amount of the dividend thus deemed to have been paid to it shall be deemed to be part of its total income for the purpose also of the application of that sub-section to distributions of profits by that company.

Set-off of loss in computing aggregate income.

24. (1) Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in Section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year.

Provided that where the assessee is an unregistered firm which has not been assessed under the provisions of clause (b) of sub-section (5) of Section 23 in the manner applicable to a

registered firm, any such loss shall be set off only against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the firm; and where the assessee is a registered firm, any loss which cannot be set off against other income, profits and gains of the firm shall be apportioned between the partners of the firm and they alone shall be entitled to have the amount of the loss set off under this Section ;

(2) Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 31st day of March, 1940, under the head 'Profits and gains of business, profession or vocation', and the loss cannot be wholly set off under sub-section (1), the portion not so set off shall be carried forward to the following year and set off against the profits and gains, if any, of the assessee from the same business, profession or vocation for that year; and if it cannot be wholly so set off, the amount of loss not so set-off shall be carried forward to the following year, and so on; but no loss shall be so carried forward for more than six years, and a loss arising in the previous years for the assessment for the years ending on the 31st day of March 1940, the 31st day of March, 1941, the 31st day of March, 1942, the 31st day of March, 1943, and the 31st day of March, 1944, respectively shall be carried forward only for one, two, three, four and five years, respectively :

Provided that nothing herein contained shall entitle any assessee, being a registered firm, to have carried forward and set off any loss which has been apportioned between the partners, under the proviso to sub-section (1), or entitle any assessee, being a partner in an unregistered firm which has not been assessed under the provisions of clause (b) of sub-section (5) of Section 23 in the manner applicable to a registered firm, to have carried forward and set off against his own income any loss sustained by the firm :

Provided further that where an unregistered firm is assessed as a registered firm under clause (b) of sub-section (5) of Section 23, during any year, its losses shall also be carried forward and set off under this Section as if it were a registered firm :

Provided further that where a change has occurred in the constitution of a firm or where any person carrying on any business, profession or vocation has been succeeded in such capacity by another person, otherwise than by inheritance, nothing in this Section shall be deemed to entitle any person other than the person incurring the loss to have it set off against his income profits or gains.

(3) When, in the course of the assessment of the total income of any assessee, it is established that a loss of profits or gains has taken place which he is entitled to have set off under the provisions of this Section, the Income-tax Officer shall notify to the assessee by order in writing the amount of the loss as computed by him for the purposes of this Section.

Assessment in case of departure from British India.

24A. (1) When it appears to the Income-tax Officer that any person may leave British India during the current financial year, or shortly after its expiry, and that he has no present intention of returning, the Income-tax Officer may proceed to assess him on his total income of the period from the expiry of the last previous year of which the income has been assessed in his hands to the probable date of his departure from British India, or where he has not been previously assessed, on his total income of the period up to the probable date of his departure from British India. The assessment shall be made on the total income of each completed previous year included in such period at the rate at which such income would have been charged had it been fully assessed, and as respects the period from the expiry of the last of such completed previous years to the probable date of departure the Income-tax Officer shall estimate the total income of such person during such period and assess it at the rate in force for the financial year in which such assessment is made.

Provided that nothing herein contained shall authorise an Income-tax Officer to assess any income, profits or gains which have escaped assessment or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act but in respect of which he is debarred from issuing a notice under Section 34.

(2) For the purpose of making an assesment under sub-section (1) the Income-tax Officer may serve a notice upon such person requiring him to furnish, within such time not being less than seven days as may be specified in the notice, a return in the same form and verified in the same manner as a return under sub-section (2) of Section 22, setting forth (along with such other particulars as may be provided for in the notice) his total income for each of the completed previous years comprised in the relevant period referred to in the first sentence of sub-section (1) and his estimated total income for the period from the expiry of the last such completed previous year to the probable date of his departure; and the provisions of this Act shall, so far as may be, apply as if the notice were a notice issued under sub-section (3) of Section 22.

Tax of deceased person payable by representative.

24B. (1) Where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge the tax assessed as payable by such person, or any tax which would have been payable by him under this Act if he had not died.

(2) Where a person dies before the publication of the notice referred to in sub-section (1) of Section 22 or before he is served with a notice under sub-section (2) of Section 22 or Section 34, as the case may be, his executor, administrator or other legal representative shall, on the serving of the notice under sub-section (2) of Section 22 or under Section 34, as the case may be, comply therewith, and the Income-tax Officer may proceed to assess the total income of the deceased person as if such executor, administrator or other legal representatives were the assessee:

(3) Where a person dies, without having furnished a return which he has been required to furnish under the provisions of Section 22, or having furnished a return which the Income-tax Officer has reason to believe to be incorrect or incomplete, the Income-tax Officer may make an assesment of the total income of such person and determine the tax payable by him on the basis of such assesment, and for this purpose

may, by the issue of the appropriate notice which would have had to be served upon the deceased person had he survived, require from the executor, administrator or other legal representative of the deceased person any accounts, documents or other evidence which he might under the provisions of Sections 22 and 23 have required from the deceased person.

Assessment in case of discontinued business.

25. (1) Where any business, profession or vocation on which income-tax was not at any time charged under the provisions of the Indian Income-tax Act, 1918, is discontinued in any year an assessment may be made in that year on the basis of the income, profits or gains of the period between the end of the previous year and the date of such discontinuance in addition to the assessment, if any, made on the basis of the income, profits or gains of the previous year.

(2) Any person discontinuing any such business, profession or vocation shall give to the Income-tax Officer notice of such discontinuance within fifteen days thereof, and, where any person fails to give the notice required by this sub-section, the Income-tax Officer may direct that a sum shall be recovered from him by way of penalty not exceeding the amount of tax subsequently assessed on him in respect of any income, profits or gains of the business, profession or vocation up to the date of its discontinuance.

(3) Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is discontinued, then, unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year

exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.

(4) Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939, carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and, if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.

(5) No claim to the relief afforded under sub-section (3) or sub-section (4) shall be entertained unless it is made before the expiry of one year from the date on which the business, profession or vocation was discontinued or the succession took place, as the case may be ;

(6) Where an assessment is to be made under sub-section (1) sub-section (3), or sub-section (4) the Income-tax Officer may serve on the person whose income, profits and gains are to be assessed, or, in the case of a firm, on any person who was a member of such firm at the time of its discontinuance, or in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

Assessment after partition of a Hindu undivided family.

25A. (1) Where, at the time of making an assessment under Section 23, it is claimed by or on behalf of any member

of a Hindu family hitherto assessed as undivided that partition has taken place among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and, if he is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions, he shall record an order to that effect :

Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.

(2) Where such an order has been passed, or where any person has succeeded to a business, profession or vocation formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business, profession or vocation the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no partition had taken place and each member or group of members shall, in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-section (1) of Section 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it; and the Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of Section 23 :

Provided that all the members and groups of members whose joint family property has been partitioned shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such.

(3) Where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family.

Change in constitution of a firm.

26. (1) Where at the time making an assessment under Section 23, it is found that a change has occurred in the constitution of a firm or that a firm has been newly constituted, the

assessment shall be made on the firm as constituted at the time of making the assessment.

Provided that the income, profits and gains of the previous year shall, for the purpose of inclusion in the total incomes of the partners, be apportion between the partners who in such previous year were entitled to receive the same :

Provided further that when the tax assessed upon a partner cannot be recovered from him it shall be recovered from the firm as constituted at the time of making the assessment ;

(2) Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of sub-section (4) of Section 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year :

Provided that, when the person succeeded in the business, profession or vocation cannot be found, the assessment of the profits of the year in which the succession took place up to the date of succession, and for the year preceding that year shall be made on the person succeeding him in like manner and to the same amount as it would have been made on the person succeeded or when the tax in respect of the assessment made for either of such years assessed on the person succeeded cannot be recovered from him, it shall be payable by and recoverable from the person succeeding, and such person shall be entitled to recover from the person succeeded the amount of any tax so paid.

Procedure in registration of firms.

29A. (1) Application may be made to the Income-tax officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax.

(2) The application shall be made by such person or persons, and at such times and shall contain such particulars and shall be in such form, and be verified in such manner, as may

be prescribed; and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed.

Cancellation of assessment when cause is shown.

27. Where an assessee within one month from the service of a notice of demand issued as hereinafter provided, satisfies the Income-tax Officer that he was prevented by sufficient cause from making the return required by Section 22, or that he did not receive the notice issued under sub-section (4) of Section 22, or sub-section (2) of Section 23, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying, with the terms of the last-mentioned notice, the Income-tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of Section 23.

Penalty for concealment of income or improper distribution of profits.

28. (1) If the Income-tax Officer, the Appellate Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act, is satisfied that any person—

- (a) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub-section (1) or sub-section (2) of Section 22 or Section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice, or
- (b) has without reasonable cause failed to comply with a notice under sub-section (4) of Section 22 or sub-section (2) of Section 23, or
- (c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty, in the case referred to in clause (a), in addition to the amount of the income-tax and super-tax, if any, payable by him, a sum not exceeding one and a half times that amount; and in the cases referred to in clauses (b) and (c), in addition to any tax payable by him, a sum not exceeding one and half times the

amount of the income-tax and super-tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income :

Provided that—

- (a) no penalty for failure to furnish the return of his total income shall be imposed on an assessee whose total income is less than three thousand five hundred rupees* unless he has been served with a notice under sub-section (2) of Section 22;
- (b) where a person has failed to comply with a notice under sub-section (2) of Section 23 or Section 34 and proves that he has no income liable to tax, the penalty imposable under this sub-section shall be a penalty not exceeding twenty-five rupees ;
- (c) no penalty shall be imposed under this sub-section upon any person assessable under Section 42 as the agent of a person not resident in British India for failure to furnish the return required under Section 22 unless a notice under sub-section (2) of that Section or under Section 34 has been served on him.

(2) If the Income-tax Officer, the Appellate Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act, is satisfied that the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners as shown in the instrument of partnership registered under this Act governing such distribution, and that any partner has thereby returned his income below its real amount, he may direct that such partner shall, in addition to the income-tax and super-tax, if any, payable by him, pay by way of penalty a sum not exceeding one and a half times the amount of income-tax and super-tax, which has been avoided, or would have been avoided if the income returned by such partner had been accepted as his correct income ; and no refund or other adjustment shall be claimable by any other partner by reason of such direction.

(3) No order shall be made under sub-section (1) or sub-section (2) unless the assessee or partner, as the case may be,

has been heard, or has been given a reasonable opportunity of being heard.

(4) No prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penalty has been imposed under this Section.

(5) An Appellate Assistant Commissioner or a Commissioner, who has made an order under sub-section (1) or sub-section (2), shall forthwith send a copy of the same to the Income-tax Officer.

(6) The Income-tax Officer shall not impose any penalty under this Section without the previous approval of the Inspecting Assistant Commissioner.

Notice of demand.

29. When any tax or penalty is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax or penalty a notice of demand in the prescribed form specifying the sum so payable.

Appeal against assessment under this Act.

30. (1) Any assessee objecting to the amount of income assessed under Section 23 or Section 27, or the amount of loss computed under Section 24 or the amount of tax determined under Section 23 or Section 27, or denying his liability to be assessed under this Act, or objecting to a refusal of an Income-tax Officer to register a firm under Section 26A or to make a fresh assessment under Section 27, or objecting to any order under sub-section (2) of Section 25 or Section 25A or sub-section (2) of Section 26 or Section 29, made by an Income-tax Officer or objecting to any penalty imposed by an Income-tax Officer under sub-section (6) of Section 44E or sub-section (5) of Section 44F or sub-section (1) of Section 46, or objecting to a refusal of an Income-tax Officer to allow a claim to a refund under Section 48, 49 or 49F, or to the amount of the refund allowed by the Income-tax Officer under any of those Sections, and any assessee, being a company, objecting to an order made by an Income-tax Officer under sub-section (1) of Section 29A, may appeal to the Appellate Assistant Commissioner against the assessment or against such refusal or order :

Provided that no appeal shall lie against an order under sub-section (1) of Section 46 unless the tax has been paid :

Provided further that where the partners of a firm are individually assessable on their shares in the total income of the firm, any such partner may appeal to the Appellate Assistant Commissioner against any order of an Income-tax Officer determining the amount of the total income or the loss of the firm or the apportionment thereof between the several partners, but in respect of matters which are determined by such order may not appeal against the assessment of his own total income :

Provided further that a shareholder in a company in respect of which an order under Section 23A has been passed by an Income-tax Officer, may not in respect of matters determined by such order appeal against the assessment of his own total income.

(2) The appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating to the assessment or penalty objected to or of the intimation of the refusal to pass an order under sub-section (1) of Section 25A, or to register a firm under section 26A or of the date of the refusal to make a fresh assessment under Section 27 or of the intimation of an order under sub-section (1) of Section 23A or under Sections 48, 49 or 49F, as the case may be; but the Appellate Assistant Commissioner may admit an appeal after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

(3) The appeal shall be in the prescribed form and shall be verified in the prescribed manner.

Hearing of appeal.

31. (1) The Appellate Assistant Commissioner shall fix a day and place for the hearing of the appeal, and may, from time to time, adjourn the hearing.

(2) The Appellate Assistant Commissioner may, before disposing of any appeal, make such further inquiry as he thinks fit, or cause further inquiry to be made by the Income-tax Officer.

(2A) The Appellate Assistant Commissioner may, at the hearing of an appeal, allow an appellant to go into any

ground of appeal not specified in the grounds of appeal, if the Appellate Assistant Commissioner is satisfied that the omission of that ground from the form of appeal was not wilful or unreasonable.

(3) In disposing of an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment.—

(a) confirm, reduce, enhance or annul the assessment, and, in the case of an assessment on a firm or association of persons, authorise the Income-tax Officer to amend accordingly any assessment made on any partner of the firm or any member of the association, or

(b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment and determine where necessary the amount of tax payable on the basis of such fresh assessment,

or, in the case of an order refusing to register a firm under Section 26A or to make a fresh assessment under Section 27,

(c) confirm such order, or cancel it and direct the Income-tax Officer to register the firm or to make a fresh assessment, as the case may be,

or, in the case of an order under sub-section (2) of Section 25 or sub-section (1) of Section 23A or sub-section (2) of Section 26 or Section 48, 49 or 49F ;

(d) confirm, cancel or vary such order.

or, in the case of an order under sub-section (1) of Section 25A,

(e) confirm such order or cancel it and either direct the Income-tax Officer to make further inquiry and pass a fresh order or to make an assessment in the manner laid down in sub-section (2) of Section 25 A,

or, in the case of an order under Section 28 or sub-section (6) of Section 44E or sub-section (5) of Section 44F or sub-section (1) of Section 45,

(f) confirm or cancel such order or vary it so as either to enhance or reduce the penalty ;

or, in the case of an appeal against a computation of loss under Section 24,

(g) confirm or vary such computation ;

Provided that the Appellate Assistant Commissioner shall not enhance an assessment or a penalty unless the appellant has had a reasonable opportunity of showing cause against such enhancement.

Provided further that at the hearing of any appeal against an order of an Income-tax Officer, the Income-tax Officer shall have the right to be heard either in person or by a representative. Appeals against orders of Appellate Assistant Commissioner.

32. (1) Any assessee objecting to an order passed by an Appellate Assistant Commissioner under Section 28 or to an order under sub-section (3) of Section 31 enhancing his assessment or a penalty imposed under Section 28 or sub-section (6) of Section 44E or sub-section (5) of Section 44F may appeal to the Commissioner within thirty days of the date on which he was served with notice of such order.

(2) The appeal shall be in the prescribed form, and shall be verified in the prescribed manner.

(3) In disposing of the appeal the Commissioner may, after giving the appellant an opportunity of being heard, pass such orders thereon as he thinks fit.

Power of revision.

33. (1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any authority subordinate to him or by himself when exercising the powers of an Appellate Assistant Commissioner under sub-section (5) of Section 5.

(2) On receipt of the record the Commissioner may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such orders thereon as he thinks fit :

Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard.

33A. Reference to Board of Referees. *Omitted by Section 40 of the Indian Income-tax (Amendment) Act, 1939 (7 of 1939).*
Income escaping assessment.

34. (1) If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, or have been under assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act the Income-tax Officer may, in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years, and in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be.

Provided further that when the income, profits or gains concerned are income, profits or gains liable to assessment for a year ending prior to the commencement of the Indian Income-tax (Amendment) Act, 1939, or where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under Section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year were substituted.

(2) No order of assessment under Section 23 or of assessment or re-assessment under sub-section (1) of this Section shall be made after the expiry, in any case to which clause (a) of

sub-section (1) of Section 28 applies, of eight years, and in any other case, of four years from the end of the year in which the income, profits or gains were first assessable.

Rectification of mistake

35. (1) The Commissioner or Appellate Assistant Commissioner may, at any time, within four years from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision under Section 33 and the Income-tax Officer may, at any time within four years from the date of any assessment order passed by him on his own motion rectify any mistake apparent from the record of the appeal, revision or assessment, as the case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee.

Provided that no such rectification shall be made, having the effect of enhancing an assessment unless the Commissioner, the Appellate Assistant Commissioner or the Income-tax Officer, as the case may be, has given notice to the assessee of his intention so to do and has allowed him a reasonable opportunity of being heard.

Provided further that no such rectification shall be made of any mistake in any order passed more than one year before the commencement of the Indian Income-tax (Amendment) Act, 1939.

(2) Where any such rectification has the effect of reducing the assessment, the Income-tax Officer shall make any refund which may be due to such assessee.

(3) Where any such rectification has the effect of enhancing the assessment, the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under Section 29, and the provisions of this Act shall apply accordingly.

Tax to be calculated to nearest anna.

36. In the determination of the amount of tax or of a refund payable under this Act, fractions of an anna less than six pies shall be disregarded, and fractions of an anna equal to or exceeding six pies shall be regarded as one anna.

Power to take evidence on oath, etc.

37. The Income-tax Officer, Appellate Assistant Commissioner and Commissioner shall, for the purposes of this Chapter, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters, namely :—

- (a) enforcing the attendance of any person and examining him on oath or affirmation :
- (b) compelling the production of documents ; and
- (c) issuing commissions for the examination of witnesses, and any proceeding before an Income-tax Officer, Appellate Assistant Commissioner or Commissioner under this Chapter shall be deemed to be a "judicial proceeding" within the meaning of Sections 193 and 228 and for the purposes of Section 196 of the Indian Penal Code.

Power to call for information.

38. The Income-tax Officer or Assistant Commissioner may, for the purposes of this Act,—

- (1) require any firm, or Hindu undivided family to furnish him with a return of the members of the firm, or of the manager or adult male members of the family, as the case may be, and of their addresses ;
- (2) require any person whom he has reason to believe to be a trustee, guardian, or agent, to furnish him with a return of the names of the persons for or of whom he is trustee, guardian, or agent, and of their addresses ;
- (3) require any assessee to furnish a statement of the names and addresses of all persons to whom he has paid in any year rent, interest, commission, royalty or brokerage, or any annuity not being an annuity taxable under the head 'Salaries', amounting to more than four hundred rupees, together with particulars of all such payments made.

Power to inspect the register of members of any company

39. The Income-tax Officer or Assistant Commissioner, or any person authorised in writing in this behalf by the Income-tax Officer or Assistant Commissioner, may inspect and, if

necessary, take copies, or cause copies to be taken, of any register of the members, debenture-holders or mortgagees of any company or of any entry in such register.

CHAPTER V.

LIABILITY IN SPECIAL CASES.

Guardians, trustees and agents.

40. In the case of any guardian, trustee or agent of any person being a minor, lunatic or idiot or residing out of British India (all of which persons are hereinafter in this Section included in the term beneficiary) being entitled to receive on behalf of such beneficiary any income, profits or gains chargeable under this Act, the tax shall be levied upon and recoverable from such guardian, trustee or agent, as the case may be, in like manner and to the same amount as it would be leviable upon and recoverable from any such beneficiary if of full age, sound mind, or resident in British India, and in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly.

Provided that in the case of a beneficiary being a person residing out of British India the tax may be levied upon and recovered from him direct.

Court of Wards, etc.

41. (1) In the case of income, profits or gains chargeable under this Act which the Court of Wards, the Administrators-General, the Official Trustees or any receiver or manager (including any person whatever his designation who in fact manages property on behalf of another) appointed by or under any order of a Court, or any trustee or trustees appointed under a duly executed trust deed, (including the trustee or trustees under any Wakf deed which is valid under the Mussalman Wakf Validating Act, 1913), are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such Court of Wards, Administrator-General, Official Trustee, receiver or manager or trustee or trustees, in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable, and all the provisions of this Act shall apply accordingly.

Provided that where any such income, profits or gains or any part thereof are not specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate :

Provided further that when part only of the income, profits and gains of a trust is chargeable under this Act, that proportion only of the income, profits and gains receivable by a beneficiary from the trust which the part so chargeable bears to the whole income, profits and gains of the trust shall be deemed to have been derived from that part.

(2) Nothing contained in sub-section (1) shall prevent either the direct assessment of the person on whose behalf income, profits or gains therein referred to are receivable, or the recovery from such person of the tax payable in respect of such income, profits or gains.

Non-residents.

42. (1) All income, profits or gains accruing or arising, whether directly or indirectly, through or from any business connection in British India, or through or from any property in British India, or through or from any asset or source of income in British India, or through or from any money lent at interest and brought into British India in cash or in kind, shall be deemed to be income accruing or arising within British India, and where the person entitled to the income, profits or gains is not resident in British India, shall be chargeable to income-tax either in his name or in the name of his agent, and in the latter case such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax :

Provided that where the person entitled to the income, profits or gains is not resident in British India, the income-tax so chargeable may be recovered by deduction under any of the provisions of Section 18 and that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person which are, or may at any time come within British India.

Provided further that any such agent, or any person who apprehends that he may be assessed as such an agent, may

retain out of any money payable by him to such non-resident person a sum equal to his estimated liability under this subsection, and in the event of any disagreement between the non-resident person and such agent or person as to the amount to be so retained, such agent or person may secure from the Income-tax Officer a certificate stating the amount to be so retained pending final settlement of the liability, and the certificate so obtained shall be his warrant for retaining that amount :

Provided further that the amount recoverable from such agent or person at the time of final settlement shall not exceed the amount specified in such certificate except to the extent to which such agent or person may at such time have in his hands additional assets of such non-resident person.

(2) Where a person not resident or not ordinarily resident in British India carries on business with a person resident in British India, and it appears to the Income-tax Officer, that owing to the close connection between such persons the course of business is so arranged that the business done by the resident person with the person not resident or not ordinarily resident produces to the resident either no profits or less than the ordinary profits which might be expected to arise in that business, the profits derived therefrom or which may reasonably be deemed to have been derived therefrom, shall be chargeable to income-tax in the name of the resident person who shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax.

(3) In the case of a business of which all the operations are not carried out in British India, the profits and gains of the business deemed under this Section to accrue or arise in British India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in British India.

Agent to include persons treated as such.

43. Any person employed by or on behalf of a person residing out of British India, or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the Income-tax Officer

has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent :

Provided that where transactions are carried on in the ordinary course of business through a broker in British India in such circumstances that the broker does not in respect of such transactions deal directly with or on behalf of a non-resident principal but deals with or through a non-resident broker who is carrying on such transactions in the ordinary course of his business and not as a principal such first mentioned broker shall not be deemed to be an agent under this Section in respect of such transactions :

Provided further that no person shall be deemed to be the agent of a non-resident person, unless he has had an opportunity of being heard by the Income-tax Officer as to his liability.

Liability in case of a discontinued firm or association.

44. Where any business, profession or vocation carried on by a firm or association of persons has been discontinued, or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of the income, profits and gains of the firm or association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment.

CHAPTER VA.

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF SHIPPING.

Liability to tax of occasional shipping.

44A. The provisions of this Chapter shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the levy and recovery of tax in the case of any person who resides out of British India and carries on business in British India in any year as the owner or charterer of a ship (such person hereinafter in this Chapter being referred to as the principal), unless the Income-tax Officer is satisfied that there is an agent of such principal from whom the tax will be recoverable in the following year under the other provisions of this Act.

Return of profits and gains.

44B. (1) Before the departure from any port in British India of any ship in respect of which the provisions of this Chapter apply, the master of the ship shall prepare and furnish to the Income-tax Officer a return of the full amount paid or payable to the principal, or to any person on his behalf, on account of the carriage of all passengers, live-stock or goods shipped at that port since the last arrival of the ship thereat.

(2) On receipt of the return, the Income-tax Officer shall assess the amount referred to in sub-section (1), and for this purpose may call for such accounts or documents as he may require, and one-twentieth of the amount so assessed shall be deemed to be the amount of the profits and gains accruing to the principal on account of the carriage of the passengers, live-stock and goods shipped at the port.

(3) When the profits and gains have been assessed as aforesaid, the Income-tax Officer shall determine the sum payable as tax thereon at the rate for the time being applicable to the total income of a company, and such sum shall be payable by the master of the ship, and a port-clearance shall not be granted to the ship until the Customs-collector, or other officer duly authorised to the grant the same, is satisfied that the tax has been duly paid.

Adjustment.

44C. Nothing in this Chapter shall be deemed to prevent a principal from claiming in the year following that in which any payment has been made on his behalf under this Chapter, that an assessment be made of his total income in the previous year, and that the tax payable on the basis thereof be determined in accordance with the other provisions of this Act, and, if he so claims, any such payment as aforesaid shall be treated as a payment in advance of the tax and the difference between the sum so paid, and the amount of tax found payable by him shall be paid by him or refunded to him, as the case may be.

CHAPTER VB.

SPECIAL PROVISIONS RELATING TO AVOIDANCE OF LIABILITY TO INCOME-TAX AND SUPER-TAX

Avoidance of income-tax by transactions resulting in the

transfer of income to persons resident or ordinarily resident abroad.

44D. (1) Where any person has, by means of a transfer of assets, by virtue or in consequence whereof, either alone or in conjunction with associated operations, any income which if it were the income of such person would be chargeable to income-tax becomes payable to a person not resident or to a person resident but not ordinarily resident in British India, acquired any rights by virtue or in consequence of which he has within the meaning of this Section power to enjoy such income, whether forthwith or in the future, that income shall, whether it would or would not have been chargeable to income-tax apart from the provisions of this Section, be deemed to be income of such first mentioned person for all the purposes of this Act.

(2) Where any person receives or is entitled to receive, whether before or after any transfer of assets by virtue or in consequence whereof either alone or in conjunction with associated operations any income becomes payable to a person not resident or resident but not ordinarily resident in British India, any sum paid or payable by way of a loan or repayment of a loan or any sum, being a sum which is not paid or payable for full consideration in money or money's worth, paid or payable otherwise than as income, such income shall, whether it would or would not have been chargeable to income-tax apart from the provisions of this Section, be deemed to be income of the first mentioned person for all the purposes of this Act.

(3) Sub-sections (1) and (2) shall not apply if such first mentioned person shows to the satisfaction of the Income-tax Officer either—

(a) that neither the transfer nor any associated operation had for its purpose or for one of its purposes the avoidance of liability to taxation : or

(b) that the transfer and all associated operations were *bona fide* commercial transactions and were not designed for the purpose of avoiding liability to taxation.

(4) For the purposes of this Section, an 'associated operation' means, in relation to any transfer, an operation of any

kind effected by any person in relation to any of the assets transferred or any assets representing whether directly or indirectly any of the assets transferred, or to the income arising from any such assets, or to any assets representing whether directly or indirectly the accumulations of income arising from any such assets.

(5) A person shall for purposes of this Section, be deemed to have power to enjoy income of a person not resident, or resident but not ordinarily resident, British India, if —

- (a) the income is in fact so dealt with by any person as to be calculated at some point of time and, whether in the form of income or not, to enure for the benefit of the first mentioned person, or
- (b) the receipt or accrual of the income operates to increase the value to such first mentioned person of any assets held by him or for his benefit, or
- (c) such first mentioned person receives or is entitled to receive at any time any benefit provided or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which represent that income, or
- (d) such first mentioned person has power by means of the exercise of any power of appointment or power of revocation or otherwise to obtain for himself, whether with or without the consent of any person, the beneficial enjoyment of the income, or
- (e) such first mentioned person is able, in any manner whatsoever and whether directly or indirectly, to control the application of the income.

(6) In determining whether a person has power to enjoy income within the meaning of this Section regard shall be had to the substantial result and effect of the transfer and any associated operations, and all benefits which may at any time accrue to such person as a result of the transfer and any associated operation shall be taken into account irrespective of the nature or form of the benefits.

(7) For the purposes of this Section—

- (a) the expression 'assets' includes property or rights of any kind, and the expression 'transfer' in relation to rights includes the creation of those rights;
- (b) the expression 'benefit' includes a payment of any kind;
- (c) references to income of person not resident or of a person not ordinarily resident in British India shall, where the amount of the income of a company for any year or period has been deemed to have been distributed under sub-section (1) of Section 23A, include references to so much of the income of the company for that year or period as is equal to the amount deemed to have been distributed to that person;
- (d) references to assets representing any assets, income or accumulations of income include references to shares in or obligations of any company to which, or obligation of any other person to whom, those assets, that income or those accumulations are or have been transferred;
- (e) any body corporate incorporated outside British India shall be treated as if it were resident out of British India whether it is so resident or not.

(8) The provisions of this Section shall apply for the purposes of assessment to income-tax and super-tax for the year ending on the 31st March, 1940, and subsequent years, and shall apply, in relation to transfers of assets and associated operations whether carried out before or after the commencement of the Indian Income-tax (Amendment) Act, 1939.

(9) Where any person has been charged to tax on any income deemed to be his under the provisions of this Section, and that income is subsequently received by him, whether as income or in any other form, shall not again be deemed to form part of his income for the purposes of this Act.

Avoidance of tax by certain transactions in securities.

44K. (1) Where the owner of any securities (in this sub-section and in sub-section (2) referred to as 'the owner') agrees to sell or transfer those securities, and by the same or any collateral agreement—

(a) agrees to buy back or re-acquire the securities, or

(b) acquires an option, which he subsequently exercises, to buy back or re-acquire the securities.

then, if the result of the transaction is that any interest becoming payable in respect of the securities is receivable otherwise than by the owner, the interest payable as aforesaid shall, whether it would or would not have been chargeable to tax apart from the provisions of this Section, be deemed for all the purposes of this Act to be the income of the owner and not to be the income of any other person.

(2) The references in sub-section (1) to buying back or re-acquiring the securities shall be deemed to include references to buying or acquiring similar securities, so, however, that where similar securities are bought or acquired, the owner shall be under no greater liability to tax than he would have been under if the original securities had been bought back or re-acquired.

(3) Where any person carrying on a business which consists wholly or partly in dealing in securities agrees to buy or acquire any securities, and by the same or any collateral agreement—

(a) agrees to sell back or re-transfer the securities, or

(b) acquires an option, which he subsequently exercises, to sell back or re-transfer the securities,

then, if the result of the transaction is that any interest becoming payable in respect of the securities is receivable by him, no account shall be taken of the transaction in computing for any of the purposes of this Act the profits arising from or loss sustained in the business.

(4) Sub-section (2) shall have effect, subject to any necessary modifications, as if references to selling back or re-transferring the securities included references to selling or transferring similar securities.

(5) For the purpose of this Section—

(a) the expression 'interest' includes a dividend ;

(b) the expression 'securities' includes stocks and shares ;

(c) securities shall be deemed to be similar if they entitle their holders to the same rights against the same

persons as to capital and interest and the same remedies for the enforcement of those rights, notwithstanding any difference in the total nominal amounts of the respective securities or in the form in which they are held or the manner in which they can be transferred.

(6) The Income-tax Officer may, by notice in writing, require any person to furnish him within such time as he may direct (not being less than twenty-eight days), in respect of all securities of which such person was the owner at any time during the period specified in the notice, such particulars as he considers necessary for the purposes of this Section and for the purpose of discovering whether tax has been borne in respect of the interest on all those securities; and, if that person without reasonable excuse fails to comply with the notice, he shall be liable to a penalty not exceeding five hundred rupees and to a further penalty of the like amount for every day after the infliction for such penalty during which the failure continues.

Avoidance of tax by sales *cum* dividend.

- 44F. (1) Any person upon whom notice is served by the Income-tax Officer requiring him to furnish a statement of particulars relating to any securities in which, at any time during the period specified in the notice, he has had any beneficial interest, and in respect of which within such period, either no income was received by him, or the income received by him was less than the sum to which the income would have amounted if the income from such securities had accrued from day to day and been apportioned accordingly, shall, whether an assessment to income-tax or super-tax in respect of his total income has or has not been made for the relevant year or years of assessment, furnish such a statement and such particulars in the form and within the time (not being less than twenty-eight days) required by the notice.

(2) If it appears to the Income-tax Officer by reference to all the circumstances in relation to the securities of any such person (including circumstances with respect to sales, purchases, dealings, contracts, arrangements, transfers, or any other transactions relating to such securities) that such person has thereby

avoided or would avoid more than ten per cent, of the amount of the income-tax or super-tax for any year which would have been payable in his case in respect of the income from those securities if the income had been deemed to accrue from day to day and had been apportioned accordingly, and the income so deemed to have been apportioned to him had been treated as part of his total income from all sources for the purposes of income-tax or super-tax, then those securities shall be deemed to be securities to which sub-section (3) applies.

(3) For the purposes of assessment to income-tax or super-tax in the case of any such person, the income from any securities to which this sub-section applies shall be deemed to accrue from day to day, and in the case of the sale or transfer of any such securities by or to him shall be deemed to have been received as and when it is deemed to have accrued :

Provided that this Section shall not apply if such person proves to the satisfaction of the Income-tax Officer that the avoidance of income-tax or super-tax was exceptional and not systematic and that there was not in his case in any of the three preceding years any such avoidance of income-tax or super-tax, or that the provisions of Section 44E have been applied in his case in respect of such income.

(4) If any person fails to furnish any statement or particulars required under this Section, or if the Income-tax Officer is not satisfied with any statement or particulars furnished under this Section, the Income-tax Officer may make an estimate of the amount of the income which, under the foregoing provisions of this Section, is to be deemed to form part of the person's total income for the purposes of income-tax or super-tax.

(5) If any person without reasonable excuse fails to furnish any statement or particulars required under this Section, he shall be liable to a penalty not exceeding five hundred rupees, and to a further penalty of the like amount for every day after the infliction of such penalty during which the failure continues.

(6) For the purpose of this Section the expression 'securities' includes stocks and shares.

CHAPTER VI.

RECOVERY OF TAX AND PENALTIES.

Tax when payable.

45. Any amount specified as payable in a notice of demand under sub-section (3) of Section 23A or under Section 29 or an order under Section 31 or Section 32 or Section 32, shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default provided that, when an assessee has presented an appeal under Section 30, the Income-tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of :

Provided further that where an assessee has been assessed in respect of income arising outside British India in a country the laws of which prohibit or restrict the remittance of money to British India, the Income-tax Officer shall not treat the assessee as in default in respect of that part of the tax which is due in respect of that amount of his income which by reason of such prohibition or restriction cannot be brought into British India, and shall continue to treat the assessee as not in default in respect of such part of the tax until the prohibition or restriction is removed.

Explanation.—For the purposes of this Section income shall be deemed to have been brought into British India if it has been utilised or could have been utilized for the purposes of any expenditure actually incurred by the assessee without British India or if the income whether capitalized or not has been brought into British India in any form.

Mode and time of recovery.

46. (1) When an assessee is in default in making a payment of income-tax, the Income-tax Officer may, in his discretion, direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty.

(1A) For the purposes of sub-section (1), the Income-tax Officer may direct the recovery of any sum less than the amount

of the arrears and may enhance the sum so directed to be recovered, from time to time, in the case of a continuing default, so, however, that the total sum so directed to be recovered shall not exceed the amount of the arrears payable.

(2) The Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue :

Provided that without prejudice to any other powers of the Collector in this behalf, he shall for the purpose of recovering the said amount have in respect of the attachment and sale of debts due to the assessee the powers which under the Code of Civil Procedure, 1908, a Civil Court has in respect of the attachment and sale of debts due to a judgment-debtor for the purpose of the recovery of an amount due under a decree.

(3) In any area with respect to which the Commissioner has directed that any arrears may be recovered by an process enforceable for the recovery of an arrear of any municipal tax or local rate imposed under any enactment for the time being in force in any part of the province, the Income-tax Officer may proceed to recover the amount due by such process.

(4) The Commissioner may direct by what authority any powers or duties incident under any such enactment as aforesaid to the enforcement of any process for the recovery of a municipal tax or local rate shall be exercised or performed when that process is employed under sub-section (3).

(5) If any assessee is in receipt of any income chargeable under the head "Salaries" the Income-tax Officer may require any person paying the same to deduct from any payment subsequent to the date of such requisition any arrears due from such assessee, and such person shall comply with any such requisition, and shall pay the sum so deducted to the credit of the Central Government, or as the Central Board of Revenue directs.

(6) If the recovery of income-tax in any area has been entrusted to a Provincial Government under Section 124 (1) of the Government of India Act, 1935, the Provincial Government

may direct with respect to that area or any part thereof, that income-tax shall be recovered therein with, and as an addition to, any municipal tax or local rate, by the same person and in the same manner as the municipal tax or local rate is recovered.

(7) Save in accordance with the provisions of sub-section (1) of Section 42, or of the proviso to Section 45, no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the financial year in which any demand is made under this Act.

Recovery of penalties.

47. Any sum imposed by way of penalty under the provisions of sub-section (2) of Section 25, Section 28, sub-section (6) of Section 44E, sub-section (5) of Section 44F or sub-section (1) of Section 46, shall be recoverable in the manner provided in this Chapter for the recovery of arrear of tax.

CHAPTER VII.

Refunds.

48. (1) If any individual, Hindu undivided family, company, local authority, firm or other association of persons, or any partner of a firm or member of an association individually satisfies the Income-tax Officer or other authority appointed by the Central Government in this behalf that the amount of tax paid by him or on his behalf or treated as paid on his behalf for any year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of any such excess.

(2) The Appellate Assistant Commissioner in the exercise of his appellate powers, or the Commissioner in the exercise of his appellate powers or powers of revision if satisfied to the like effect shall cause a refund to be made by the Income-tax Officer of any amount found to have been wrongly paid or paid in excess.

(3) Where income of one person is included under any provision of this Act in the total income of any other person such other person only shall be entitled to a refund under this Section in respect of such income.

(4) Nothing in this Section shall operate to validate any objection or appeal which is otherwise invalid or to authorise the revision of any assessment or other matter which has become final and conclusive, or the review by any officer of a decision of his own which is subject to appeal or revision, or where any relief is specifically provided elsewhere in this Act, to entitle any person to any relief other or greater than that relief or to entitle any person to claim a refund of tax payable before the commencement of the Indian Income-tax (Amendment) Act, 1939, which he would not be entitled to claim but for the passing of that Act.

48. A General power to make refunds.—*Repealed by Act 7 of 1939, Section 58.*

Relief in respect of United Kingdom Income-tax.

49. (1) If any person who has paid by deduction under Section 18 or otherwise Indian income-tax for any year on any part of his income proves to the satisfaction of the Income-tax Officer that he has paid by deduction or otherwise United Kingdom income-tax for the corresponding year in respect of the same part of his income and that the rate at which he was entitled to, and has obtained, relief under the provisions of Section 27 of the Finance Act, 1920, is less than the Indian rate of tax charged in respect of that part of his income, he shall be entitled to a refund of a sum calculated on that part of his income at a rate equal to the difference between the Indian rate of tax or the appropriate rate of United Kingdom income-tax, whichever is less, and the rate at which he was entitled to, and obtained relief under that Section.

Provided that in no case shall the rate at which such refund is calculated exceed half the Indian rate of tax appropriate to the income of the person entitled to relief.

(2) In sub-section (1):—

- (a) the expression "Indian income-tax" means income-tax and super-tax charged in accordance with the provisions of this Act ;
- (b) the expression "Indian rate of tax" means the amount of Indian income-tax exclusive of super-tax after deduction of any relief due to a claimant under the

- other provisions of this Act but before deduction of any relief due to him under this Section, divided by his total income after deducting therefrom any income (including income from a share in an unregistered firm) exempted from tax by or under the provisions of this Act, added to the amount of Indian super-tax before deduction of any relief due to the claimant under this Section divided by his total income;
- (c) the expression "United Kingdom income-tax" means income-tax and super-tax chargeable in accordance with the provisions of the Income-tax Acts.
- (d) the expression "appropriate rate of United Kingdom income-tax" has the meaning assigned to that expression in Section 27 of the Finance Act, 1920, as amended by the Finance Act, 1927.

Relief in respect of Indian State and Dominion Income-tax.

49A. (1) The Central Government may, by notification in the official Gazette, make provision for the granting of relief in respect of income on which has been paid both income-tax (including super-tax) under this Act and Dominion income-tax.

(2) For the purposes of this Section "Dominion income-tax" means any income-tax or super-tax charged under any law in force in any Indian State or in any part of His Majesty's Dominions (other than the United Kingdom) where the laws of that State or part provide for relief in respect of tax charged on income both in that State or part and in British India which appears to the Central Board of Revenue to correspond to the relief which may be granted by this Section.

Payment of income-tax by company to be deemed payment by shareholder.

49B. Where a shareholder has received a dividend from a company which has paid income-tax imposed in British India or elsewhere, he shall be deemed, in respect of such dividend, himself to have paid the income-tax (exclusive of super-tax) paid by the company on so much of the dividend as bears to the whole the same proportion as the amount of income on which the company has paid such income-tax bears to the whole income of the company.

Relief granted to a company to be deemed relief granted to shareholder.

49C. (1) Where a shareholder has received a dividend from a company which has obtained the relief referred to in Section 49 or granted under Section 49A or under the India and Burma (Income-tax Relief) Order, 1936 he shall be deemed in respect of such dividend himself to have obtained such relief at the rate at which such relief has been granted, in respect of income-tax only, to the company for the financial year preceding the year in which the dividend was paid.

(2) If the rate at which a shareholder is deemed under subsection (1) to have obtained relief exceeds the rate at which he would have been entitled to relief had such relief been given direct to him by or under the said Sections or Order, any excess shall be recovered from him either as an addition to the tax payable by him on any assessment made on him under Section 23 or Section 34 or by setting it off against any relief due to him under Section 48.

Relief in respect of tax charged in country not providing for relief in respect of British Indian income-tax.

49D. If any person who has paid by deduction or otherwise Indian income-tax for any year in respect of any income arising without British India in a country the laws of which do not provide for any relief in respect of income-tax charged in British India proves that he has paid income-tax by deduction or otherwise under the laws of the said country in respect of the same income, he shall be entitled to the deduction from the Indian income-tax payable of a sum equal to one-half of such Indian income-tax or to one-half of such tax payable in the said country, whichever is less.

Power to set off amount of refunds against tax remaining payable.

49E. Where under any of the provisions of this Act, a refund is found to be due to any person, the Income-tax Officer, Appellate Assistant Commissioner or Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded, or any part of that amount

against the tax, if any, remaining payable by the person to whom the refund is due.

Power of representative of deceased person or person disabled to make claim on his behalf.

49F. Where through death, incapacity, bankruptcy, liquidation or other cause, a person who would but for such cause have been entitled to a refund under any of the provisions of this Act, or to make a claim under Section 48 or 49, is unable to receive such refund or to make such claim, his executor, administrator or other legal representative, or the trustee or receiver, as the case may be, shall be entitled to receive such refund or to make such claim for the benefit of such person or his estate.

Limitation of claims for refund.

50. No claim to any refund of income-tax or super-tax under this Chapter shall be allowed, unless it is made within four years from the last day of the financial year commencing next after the expiry of the previous year in which the income arose, accrued or was received or was deemed to have arisen, accrued or been received or was brought into British India :

Provided that where claim is to a refund of income-tax or super-tax paid prior to the commencement of the Indian Income-tax (Amendment) Act, 1939, the claim shall not be allowed unless it is made within one year from the last day of the year in which the tax was recovered or before the last day of the financial year commencing after the expiry of the previous year as defined in clause (11) of Section 2 in which the income arose on which the tax was recovered, whichever period may expire later :

Provided further that a claim to refund under Section 49 of tax paid prior to the commencement of the Indian Income-tax (Amendment) Act, 1939 may be admitted after the period of limitation herein prescribed, when the applicant satisfies the Commissioner, or an Assistant Commissioner of Income-tax specially empowered in this behalf by the Central Board of Revenue, that he had sufficient cause for not making the claim within such period.

50A. Appeal against refusal of refund.—Omitted by Section 62 of the Indian Income-tax (Amendment) Act, 1939 (7 of 1939.)

CHAPTER VIII.

OFFENCES AND PENALTIES.

Failure to make payments or deliver returns or statements or allow inspection.

51. If a person fails without reasonable cause or excuse—

- (a) to deduct and pay any tax as required by Section 18 or under sub-section (5) of Section 46 ;
- (b) to furnish a certificate required by sub-section (9) of Section 18 or by Section 20 to be furnished ;
- (c) to furnish in due time any of the returns mentioned in Section 19A, Section 20A, Section 21, sub-section (2) of Section 22, or Section 38 ;
- (d) to produce, or cause to be produced, on or before the date mentioned in any notice under sub-section (4) of Section 22, such accounts and documents as are referred to in the notice ;
- (e) to grant inspection or allow copies to be taken in accordance with the provisions of Section 39 ;

he shall, on conviction before a Magistrate, be punishable with fine which may extend to ten rupees for every day during which the default continues.

False statement in declaration.

52. If a person makes a statement in a verification mentioned in Section 19A or Section 20A or Section 21 or Section 22 or sub-section (2) of Section 26A or sub-section (3) of Section 30, or sub-section (2) of Section 32 which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable, on conviction before a Magistrate, with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Prosecution to be at instance of Inspecting Assistant Commissioner.

53. (1) A person shall not be proceeded against for an offence under Section 51 or Section 52 except at the instance of the Inspecting Assistant Commissioner.

(2) The Inspecting Assistant Commissioner may either before or after the institution of proceedings compound any such offence.

Disclosure of information by a public servant.

54. (1) All particulars contained in any statement made, return furnished or accounts or documents produced under the provisions of this Act, or in any evidence given, or affidavit or deposition made, in the course of any proceedings under this Act other than proceedings under this chapter, or in any record of any assessment proceeding, or any proceeding relating to the recovery of a demand, prepared for the purposes of this Act, shall be treated as confidential, and notwithstanding anything contained in the Indian Evidence Act, 1872, no Court shall, save as provided in this Act, be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record, or to give evidence before it in respect thereof.

(2) If a public servant discloses any particulars contained in any such statement, return, accounts, documents, evidence, affidavit, deposition or record, he shall be punishable with imprisonment which may extend to six months, and shall also be liable to fine.

(3) Nothing in the Section shall apply to the disclosure—

- (a) of any such particulars for the purposes of a prosecution under the Indian Penal Code in respect of any such statement, return, accounts, documents, evidence, affidavit or deposition, or for the purposes of a prosecution under this Act, or
- (b) of any such particulars to any person acting in the execution of this Act where it is necessary to disclose the same to him for the purposes of this Act, or
- (c) of any such particulars occasioned by the lawful employment under this Act of any process for the service of any notice or the recovery of any demand, or
- (d) of any such particulars to a Civil Court in any suit to which Government is a party, which relates to any matter arising out of any proceeding under this Act, or

- (e) of any such particulars to the Auditor General of India for the purpose of enabling him to discharge his functions under Section 144 of the Government of India Act, 1935, or
- (f) of any such particulars to any officer appointed by the Auditor General of India or the Central Board of Revenue to audit income-tax receipts or refunds, or
- (g) of any such particulars, relevant to any inquiry into the conduct of an official of the Income-tax Department, to any persons appointed Commissioners under the Public Servants (Inquiries) Act, 1850, or to an officer otherwise appointed to hold such inquiry, or to a Public Service Commission established under the Government of India Act, 1935, when exercising its functions in relation to any matter arising out of any such inquiry, or
- (h) of any such particulars occasioned by the lawful exercise by a public servant of his powers under the Indian Stamp Act, 1899, to impound an insufficiently stamped document, or
- (i) of such facts, to an authorised officer of the United Kingdom, or of any Indian State or of any part of His Majesty's Dominions which has entered into an agreement with British India for the granting of double taxation relief, as may be necessary for the purpose of enabling such relief or a refund under Section 49 of this Act to be given, or
- (j) of such facts, to an officer of a Provincial Government, as may be necessary for the purpose of enabling that Government to levy or realise any tax imposed by it on agricultural income, or
- (k) of such facts, to any authority exercising powers under the Sea Customs Act, 1878, or any Act of the Central Legislature imposing a duty of excise as may be necessary for enabling it duly to exercise such powers, or

- (l) of such facts, to a Returning Officer, as may be necessary to establish whether a person is or is not entitled to be entered on an electoral roll, or
- (m) so much of such particulars, to the appropriate authority, as may be necessary to establish whether a person has or has not been assessed to income-tax in any particular year or years, where under the provisions of any law for the time being in force such fact is required to be established ;

Nothing in this Section shall apply to the production by a public servant before a Court of any document, declaration or affidavit filed, or the record of any statement or deposition made in a proceeding under Section 25A or Section 26A, or to the giving of evidence by a public servant in respect thereof :

No prosecution shall be instituted under this Section except with the previous sanction of the Commissioner.

CHAPTER IX.

SUPER-TAX.

Charge of super-tax.

- 55. In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, local authority, unregistered firm or other association of person, not being a registered firm or the partners of the firm or members of the association individually, an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the Central Legislature ;

Provided that where under the provisions of clause (b) of sub-section (5) of Section 23 an unregistered firm has been assessed in the manner applicable to a registered firm, super-tax shall be payable by each partner of the firm individually on his share in the income, profits and gains of the firm and not by the firm itself.

Provided further, that, where the profits and gains of an unregistered firm or other association of persons not being a company have been assessed to super-tax, super-tax shall not

be payable by a partner of the firm or a member of the association, as the case may be in respect of the amount of such profits and gains which is proportionate to his share.

Total income for purposes of super-tax.

56. Subject to the provisions of this chapter, the total income of any individual, Hindu undivided family, company, local authority unregistered firm or other association of persons shall, for the purposes of super-tax, be the total income as assessed for the purposes of income-tax, and where an assessment of total income has become final and conclusive for the purposes of income-tax for any year, the assessment shall also be final and conclusive for the purposes of super-tax for the same year.

57. *Non-resident partners and shareholders.*—Omitted by Section 69 of the Indian Income-tax (Amendment) Act, 1939 (7 of 1939).

Application of Act to super-tax.

58. (1) All the provisions of this Act, relating to the charge, assessment, collection and recovery of income-tax except those contained in Section 3, the second proviso to sub-section (1) of Section 7, the second and third provisos to Section 8 sub-section (2) of Section 14, and Sections 15, 19, and 20 and the first proviso to sub-section (1) of Section 41 and Section 58F and sub-section (2) of Section 58G shall apply, so far as may be, to the charge, assessment, collection and recovery of super-tax.

(2) Save as provided in sub-sections (2), (2A), (2B), (3B), (3C), (3D) and (3E) of Section 18, and Section 58H super-tax shall be payable by the assessee direct.

CHAPTER IXA.

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF PROVIDENT FUNDS.

Definitions.

58A. In this chapter, unless there is anything repugnant in the subject or context,—

- (a) a 'recognised provident fund' means a provident fund which has been and continues to be recognised by the Commissioner, in accordance with the provisions of this chapter;

(b) an "employer" means—

- (i) a Hindu undivided family, company, firm or other association of persons, or
- (ii) an individual engaged in a business, profession or vocation whereof the profits and gains are assessable to income-tax under Section 10, maintaining a provident fund for the benefit of his or its employees ;
- (c) an "employee" means an employee participating in a provident fund, but does not include a personal or domestic servant ;
- (d) a "contribution" means any sum credited by or on behalf of any employee out of his salary, or by an employer out of his own monies, to the individual account of an employee, but does not include any sum credited as interest ;
- (e) the "balance to the credit" of an employee means the total amount to the credit of his individual account in a provident fund at any time ;
- (f) the "annual accretion" to the balance to the credit of an employee means the increase to such balance in any year, arising from contributions and interest ;
- (g) the "accumulated balance due" to an employee means the balance to his credit or such portion thereof as may be claimable by him under the regulations of the fund, on the day he ceases to be an employee of the employer maintaining the fund ; and
- (h) the "regulations of a fund" means the special body of regulations governing the constitution and administration of a particular provident fund.

The according and withdrawal of recognition.

58B. (1) The Commissioner of Income-tax may accord recognition to any provident fund which, in his opinion, satisfies the conditions prescribed in Section 58C and the rules made thereunder, and may, at any time, withdraw such recognition if, in his opinion, the provident fund contravenes any of those conditions.

(3) An order according recognition shall take effect on such date as the Commissioner may fix in accordance with any rules the Central Board of Revenue may make in this behalf, such date not being later than the last day of the financial year in which the order is made.

(8) An order withdrawing recognition shall take effect from the day on which it is made.

(4) An employer objecting to an order of the Commissioner refusing to recognise or an order withdrawing recognition from a provident fund may appeal, within sixty days of such order, to the Central Board of Revenue.

The appeal shall be in the form and shall be verified in the manner prescribed by the Central Board of Revenue.

Conditions to be satisfied by a recognised provident fund.

58C. (1) In order that a provident fund may receive and retain recognition, it shall satisfy the conditions set out below and any other conditions which the Central Government may, by rule, prescribe—

- (a) All employees shall be employed in India, or shall be employed by an employer whose principal place of business is in British India.
- (b) The contributions of an employee in any year shall be a definite proportion of his salary for that year, and shall be deducted by the employer from the employee's salary in that proportion, at each periodical payment of such salary in that year, and credited to the employee's individual account in the fund.
- (c) Subject to the provisions of Section 58D, the contributions of an employer to the individual account of an employee in any year shall not exceed the amount of the contributions of the employee in that year, and shall be credited to the employee's individual account at intervals not exceeding one year.
- (d) The fund shall consist of contributions as above specified, of accumulations thereof, and of interest (simple and compound), credited in respect of such

contributions and accumulations, and of securities purchased therewith, and of no other sums.

- (e) The fund shall be vested in two or more trustees or in the Official Trustee under a trust which shall not be revocable save with the consent of all the beneficiaries.
 - (f) The employer shall not be entitled to recover any sum whatsoever from the fund, save in cases where the employee is dismissed for misconduct or voluntarily leaves his employment otherwise than on account of ill-health or other unavoidable cause before the expiration of the term of service specified in this behalf in the regulations of the fund.
- In such cases the recoveries made by the employer shall be limited to the contributions made by him to the individual account of the employee, and to interest (simple and compound) credited in respect of such contributions and accumulations thereof, in accordance with the regulations of the fund.
- (g) The accumulated balance due to an employee shall be payable on the day he ceases to be an employee of the employer maintaining the fund.
 - (h) Save as provided in clause (g), or in accordance with such conditions and restrictions as the Central Government may, by rules, prescribe, no portion of the balance to the credit of an employee shall be payable to him.

(2) Where there is a repugnance between any regulation of a recognised provident fund and any provision of this chapter or of the rules made thereunder, the regulation shall, to the extent of the repugnance, be of no effect.

The Commissioner may, at any time, require that such repugnance shall be removed from the regulations of the fund.

Power to relax restrictions of employer's contributions in certain cases.

58D. Subject to any rules which the Central Government may make in this behalf, the Commissioner may, in respect of

any particular fund, relax the provisions of condition (c) of sub-section (1) of Section 58C—

- (a) so as to permit the payment of larger contributions by an employer to the individual accounts of employees whose salary does not exceed five hundred rupees per mensem; and
- (b) so as to permit the crediting by employers to the individual accounts of employees of periodical bonuses or other contributions of a contingent nature, where the calculation and payment of such bonuses or other contributions is provided for on definite principles by the regulations of the fund.

Annual accretion deemed to be income received.

58E. The annual accretion in any year to the balance at the credit of an employee participating in a recognised provident fund shall be deemed to have been received by him in that year and shall be included in his total income for that year, and, subject to the exemptions specified in Section 58F, shall be liable to income-tax and super-tax :

Provided that, for the purpose of sub-section (3) of Section 15, out of such annual accretion only the employee's own contributions shall be included in his total income.

Exemption of annual accretion from income-tax.

58F. (1) An employee shall not be liable to pay income-tax on contributions to his individual account in a recognised provident fund, in so far as the aggregate of such contributions in any year does not exceed one-sixth of his salary in that year or six thousand rupees whichever is less.

(2) Interest credited on the accumulated balance of any employee in a recognised provident fund shall be exempt from payment of income-tax, if and in so far as it does not exceed one-third of the salary of the employee for the year concerned and in so far as it is allowed at a rate not exceeding such rate as the Central Government may, by notification in the official Gazette, fix in this behalf.

Exemption of accumulated balance from income-tax and super-tax.

58G. (1) Where the accumulated balance due to an employee

participating in a recognised provident fund becomes payable, such accumulated balance shall be exempt from payment of super-tax except to the extent of an amount equal to the aggregate of the amounts of super-tax on annual accretions that would have been payable under Section 58E up to the first day of April, 1933, if the Indian Income-tax (Second Amendment) Act, 1933, had come into force on the 15th March, 1930.

(2) Where an employee participating in a recognised provident fund has rendered continuous service with his employer for a period of not less than five years, and the accumulated balance due to him becomes payable, such accumulated balance shall be exempt from payment of income-tax and shall be excluded from the computation of his total income :

Provided that the Commissioner of Income-tax may allow such exemption and exclusion where the employee has rendered continuous service with the employer for a period of less than five years, if, in his opinion, the service has been terminated by reason of the employee's ill-health, or by the contraction or discontinuance of the employer's business, or other cause beyond the control of the employee.

(3) Where exemption from payment of income-tax is not allowed under the provisions of sub-section (2), the Income-tax Officer shall calculate the total of the various sums of Income-tax and super-tax which would have been payable by the employee in respect of his total income for each of the years concerned if the fund had not been a recognised provident fund, and the amount by which such total exceeds the total of all sums paid by or on behalf of such employee by way of tax for such years shall be payable by the employee in addition to any other income-tax and super-tax for which he may be liable for the year in which the accumulated balance due to him becomes payable.

Deduction at source of Income-tax payable on accumulated balance due.

58H. The trustees of a recognised provident fund, or other person authorised by the regulations of the fund to make payment of accumulated balance due to employees, shall, at the time an accumulated balance due to an employee is paid, deduct -

therefrom any income-tax payable under sub-section (3) of Section 58G and any income-tax and super-tax payable on an employee's total income as determined under sub-section (3) of Section 58J, and sub-sections (4) to (9) of Section 18 shall apply as if the sum to be deducted were income-tax payable under the head "Salaries".

Accounts of recognised provident funds.

58 I. (1) The accounts of a recognised provident fund shall be maintained by the trustees of the fund and shall be in such form and for such periods, and shall contain such particulars as the Central Board of Revenue may prescribe.

(2) The accounts shall be open to inspection at all reasonable times by Income-tax authorities, and the trustees shall furnish to the Income-tax Officer such abstracts thereof as the Central Board of Revenue may prescribe.

Treatment of balances in newly recognised provident funds.

58J. (1) Where recognition is accorded to a provident fund with existing balances, an account shall be made of the fund up to the day before the day on which the recognition takes effect, showing the balance to the credit of each employee on such day, and containing such further particulars as the Central Board of Revenue may prescribe.

(2) The account shall also show in respect of the balance to the credit of each employee the amount thereof which is to be transferred to that employee's account in the recognised provident fund, and such amount (hereinafter called his transferred balance) shall be shown as the balance to his credit in the recognised provident fund on the date on which the recognition of the fund takes effect, and sub-section (3) and (4) shall apply thereto.

Any portion of the balance to the credit of an employee in the existing fund which is not transferred to the recognised fund shall be excluded from the accounts of the recognised fund and shall be liable to income-tax and super-tax in accordance with the provisions of this Act other than this chapter.

(3) Subject to such rules as the Central Board of Revenue may make in this behalf, the Income-tax Officer shall make a

calculation of the aggregate of all sums comprised in a transferred balance which would have been liable to income-tax if this chapter had been in force from the date of the institution of the fund, without regard to any tax which may have been paid on any such sum, and such aggregate (if any) shall be deemed to be income received by the employee in the year in which the recognition of the fund takes effect, and shall be included in the employee's total income for that year; and, for the purposes of assessment, the remainder of the transferred balance shall be disregarded, but no other exemption or relief, by way of refund or otherwise, shall be granted in respect of any sum comprised in such transferred balance:

Provided that, in cases of serious accounting difficulty, the Commissioner shall have power, subject to the said rules, to make a summary calculation of such aggregate.

(4) Notwithstanding anything contained in condition (h) of sub-section (1) of Section 58C, an employee, in order to enable him to pay the amount of tax assessed on his total income as determined under sub-section (3), shall be entitled to withdraw from the balance to his credit in the recognised provident fund a sum not exceeding the difference between such amount and the amount to which he would have been assessed if the transferred balance had not been included in his total income.

(5) Nothing in this Section shall effect the rights of the persons administering an unrecognised provident fund or dealing with it, or with the balance to the credit of any individual employee, before recognition is accorded, in any manner which may be lawful.

Treatment of fund transferred by employer to trustee.

58K. (1) Where an employer who maintains a provident fund (whether recognised or not) for the benefit of his employees and has not transferred the fund or any portion of it, transfers such fund or portion to trustees in trust for the employees participating in the fund, the amount so transferred shall be deemed to be of the nature of capital expenditure.

(2) When an employee participating in such fund is paid the accumulated balance due to him therefrom, any portion of such balance as represents his share in the amount so

transferred to the trustee (without addition of interest, and exclusive of the employee's contributions and interest thereon) shall, if the employer has made effective arrangements to secure that tax shall be deducted at source from the amount of such share when paid to the employee, be deemed to be an expenditure by the employer within the meaning of clause (xii) of sub-section (2) of Section 10, incurred in the year in which the accumulated balance due to the employee is paid.

Provisions relating to rules.

58L. (1) All rules made under this Chapter shall be subject to the provisions of sub-sections (4) and (5) of Section 59.

(2) In addition to any power conferred by this chapter, the Central Government may make rules—

- (a) prescribing the statements and other information to be submitted with an application for recognition ;
- (b) limiting the contributions to a recognised provident fund by employees of a company who are shareholders in the company ;
- (c) providing for the assessment by way of penalty of any consideration received by an employee for an assignment of, or creation of a charge upon, his beneficial interest in a recognised provident fund ;
- (d) determining the extent to and the manner in which exemption from payment of income-tax and super-tax may be granted in respect of contributions and interest credited to the individual accounts of employees in a provident fund from which recognition has been withdrawn ; and
- (e) generally, to carry out the purposes of this chapter and to secure such further control over the recognition of provident funds and the administration of recognised provident funds as it may deem requisite.

Application of this chapter.

58M. This chapter shall not apply to any provident fund to which the Provident Funds Act, 1925, applies.

CHAPTER IXB.

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF
SUPERANNUATION FUNDS.**Definitions.**

58N. In this chapter, unless there is anything repugnant in the subject or context,—

- (a) 'approved superannuation fund' means a superannuation fund or any part of a superannuation fund which has been and continues to be approved by the Central Board of Revenue in accordance with the provisions of this chapter ;
- (b) 'employer', 'employee', and 'contribution' have in relation to superannuation funds, the meanings assigned to those expressions in Section 58A in relation to provident funds ;
- (c) 'ordinary annual contribution' means an annual contribution of a fixed amount or an annual contribution computed on some definite basis by reference to the earnings, the contributions or the number of members of the fund.

Approval and withdrawal of approval.

58 O. (1) The Central Board of Revenue may accord approval to any superannuation fund or any part of a superannuation fund which in its opinion complies with the requirements of Section 58P, and may at any time withdraw such approval, if in its opinion the circumstances of the fund or part cease to warrant the continuance of the approval.

(2) The Central Board of Revenue shall communicate in writing to the trustees of the fund the grant of approval with the date on which the approval is to take effect, and, where the approval is granted subject to conditions, those conditions.

(3) The Central Board of Revenue shall communicate in writing to the trustees of the fund any withdrawal of approval with the reasons for such withdrawal and the date on which the withdrawal is to take effect.

(4) The Central Board of Revenue shall neither refuse nor withdraw approval to any superannuation fund or any part of

a superannuation fund unless it has given the trustees of that fund a reasonable opportunity of being heard in the matter.

Conditions for approval.

58P. In order that a superannuation fund may receive and retain approval the following conditions shall be satisfied, namely: —

- (a) the fund shall be a fund established under an irrevocable trust in connection with a trade or undertaking carried on in British India;
- (b) the fund shall have for its sole purpose the provision of annuities for employees in the trade or undertaking on their retirement at or after a specified age or on their becoming incapacitated prior to such retirement, or for the widows, children or dependants of persons who are or have been such employees on the death of those persons; and
- (c) the employer in the trade or undertaking shall be a contributor to the fund:

Provided that the Central Board of Revenue may, if it thinks fit and subject to such conditions, if any, as it thinks proper to attach to the approval, approve a fund or any part of a fund —

- (i) notwithstanding that the rules of the fund provide for the return in certain contingencies of contributions paid to the fund, or
- (ii) if the main purpose of the fund is the provision of such annuities as aforesaid, notwithstanding that such provision is not its sole purpose, or
- (iii) notwithstanding that the trade or undertaking in connection with which the fund is established is carried on only partly in British India.

Application for approval.

58Q. (1) An application for approval of a superannuation fund or part of a superannuation fund for any year of assessment shall be made in writing before the end of that year by the trustees of the fund to the Income-tax Officer, and shall be accompanied by a copy of the instrument under which the fund

is established and by two copies of the rules and of the accounts of the fund for the last year for which such accounts have been made up. The Central Board of Revenue may require such further information to be supplied as it thinks proper.

(2) If any alteration in the rules, constitution, objects or conditions of the fund is made at any time after the date of application for approval, the trustees of the fund shall forthwith communicate such alteration to the Income-tax Officer, and in default of such communication any approval given shall, unless the Central Board of Revenue otherwise orders, be deemed to have been withdrawn from the date on which the alteration took effect.

Exemption of superannuation fund from income-tax.

58R. Income derived from investments or deposits of an approved superannuation fund shall be exempt from payment of income-tax, and any sum paid by an employer or an employee by way of contribution towards an approved superannuation fund shall, in the case of an employer, be deducted in computing his income, profits or gains for the purpose of assessment, and, in the case of an employee, be treated for all the purposes of this Act as if it were a sum to which the provisions of Section 15 apply :

Provided that no such exemption shall be allowable to an employee in respect of any sum which is not an ordinary annual contribution :

Provided further that where a contribution by an employer is not an ordinary annual contribution it shall, for the purposes of this Section, be treated, as the Central Board of Revenue may direct, either as an expense incurred in the year in which the sum is paid, or as an expense to be spread over such period of years as the Central Board of Revenue thinks proper.

Treatment of repaid contributions.

58S. (1) Where any contributions (including interest on contributions, if any) are repaid to an employee, the amount so

repaid shall be deemed for the purposes of income-tax to be income of the employee for that year.

(2) Where any contributions (including interest on contributions, if any) are repaid to an employee during his lifetime but not at or in connection with the termination of his employment, income-tax on the amount so repaid or paid shall, except in the case of an employee whose employment was carried on abroad, be deducted by the trustees of the fund at the average rate of tax at which the employee was liable to income-tax during the preceding three years or during such period, if less than three years, as he was a member of the fund, and shall be paid by the trustees to the credit of the Central Government within the prescribed time and in such manner as the Central Board of Revenue may direct.

Deduction from pay of, and contributions on behalf of, employee to be included in return under Section 21.

58T. Where an employer deducts from the emoluments paid to an employee or pays on his behalf any contributions of that employee to an approved superannuation fund, he shall include all such deductions or payments in the return which he is required to furnish under Section 21.

Liabilities of trustees on cessation of approval of fund.

58U. If a fund or a part of a fund for any reason ceases to be an approved superannuation fund, the trustees of the fund shall nevertheless remain liable to account for tax on any sum paid—

(a) on account of returned contributions (including interest on contributions, if any), and

(b) in commutation or in lieu of annuities,

in so far as the sum so paid is in respect of contributions made before the fund or part of the fund ceased to be an approved fund under the provisions of this Chapter.

Particulars to be furnished in respect of superannuation funds.

58V. The trustees of an approved superannuation fund and any employer who contributes to an approved superannuation

fund shall, when required by notice from the Income-tax Officer, within twenty-one days of the date of such notice :—

- (a) furnish to the Income-tax Officer a return containing such particulars of contributions made to the fund as the notice may require :
- (b) prepare and deliver to the Income-tax Officer a return containing—
 - (i) the name and place of residence of every person in receipt of an annuity from the fund,
 - (ii) the amount of the annuity payable to each annuitant,
 - (iii) particulars of every contribution (including interest on contributions, if any) returned to the employer or to employees ; and
 - (iv) particulars of sums paid in commutation or in lieu of annuities ;
- (c) furnish to the Income-tax Officer a copy of the accounts of the fund to the last date prior to such notice to which such accounts have been made up, together with such other information and particulars as the Central Board of Revenue may reasonably require.

CHAPTER X.

MISCELLANEOUS.

Power to make Rules.

59. (1) The Central Board of Revenue may, subject to the the control of the Central Government, make rules for carrying out the purposes of this Act and for the ascertainment and determination of any class of income. Such rules may be made for the whole of British India or for such part thereof as may be specified.

(2) Without prejudice to the generality of the foregoing power, such rules may—

- (a) prescribe the manner in which, and the procedure by which, the income, profits and gains shall be arrived at in the case of—
 - (i) incomes derived in part from agriculture and in part from business ;

- (ii) persons residing out of British India ;
- (b) prescribe the procedure to be followed on applications for refunds ;
- (c) provide for such arrangements with His Majesty's Government as may be necessary to enable the appropriate relief to be granted under Section 27 of the Finance Act, 1920, or under Section 49 of this Act,
- (d) prescribe the year which, for the purpose of relief under Section 49, is to be taken as corresponding to the year of assessment for the purposes of Section 27 of the Finance Act, 1920 ; and
- (e) provide for any matter which by this Act is to be prescribed.

(3) In cases coming under clause (a) of sub-section (2) where the income, profits and gains liable to tax cannot be definitely ascertained, or can be ascertained only with an amount of trouble and expense to the assessee which, in the opinion of the Central Board of Revenue, is unreasonable, the rules made under that sub-section may—

- (a) prescribe methods by which an estimate of such income, profits and gains may be made, and
- (b) in cases coming under sub-clause (i) of clause (a) of sub-section (2), prescribe the proportion of the income which shall be deemed to be income, profits and gains liable to tax ;

and an assessment based on such estimate or proportion shall be deemed to be duly made in accordance with the provisions of this Act.

(4) The power to make rules conferred by this Section shall, except on the first occasion of the exercise thereof, be subject to the condition of previous publication.

(5) Rules made under this Section shall be published in the official Gazette, and shall thereupon have effect as if enacted in this Act.

Power to make exemptions, etc.

60. (1) The Central Government may, by notification in the official Gazette, make an exemption, reduction in

rate or other modification, in respect of income-tax in favour of any class of income, or in regard to the whole or any part of the income of any class of persons.

(2) Where, by reason of any portion of an assessee's salary being paid in arrears or in advance, or by reason of his having received in any one financial year salary for more than twelve months, or a payment which is under the provisions of sub-section (1) of Section 7 a profit in lieu of salary his income is assessed at a rate higher than that at which it would otherwise have been assessed, the Central Government may grant the appropriate relief.

(3) After the commencement of the Indian Income-tax (Amendment) Act, 1939, the power conferred by sub-section (I) shall not be exercisable except for the purpose of rescinding an exemption, reduction or modification already made.

Appearance by authorised representative.

61. (1) Any assessee, who is entitled or required to attend before any Income-tax authority in connection with any proceeding under this Act otherwise than when required under Section 37 to attend personally for examination on oath or affirmation, may attend by a person authorised by him in writing in this behalf, being a relative of or a person regularly employed by the assessee, or a lawyer or accountant or income-tax practitioner, and not being disqualified by or under sub-section (3).

In this Section,—

- (i) a person regularly employed by the assessee shall include any officer of a Scheduled Bank with which the assessee maintains a current account or has other regular dealings ;
- (ii) 'lawyer' means a Barrister-at-Law or a Solicitor or any other person entitled to plead in any Court of law in British India ;
- (iii) 'accountant' means a registered accountant enrolled in the Register of Accountants maintained by the Central Government under the Auditors' Certificate Rules, 1932, or a holder of a restricted certificate under the Restricted Certificate Rules, 1932, or a

member of an association of accountants recognised in this behalf by the Central Board of Revenue ;

(iv) ' Incom-tax practitioner ' means—

- (a) any person who, before the 1st day of April, 1938, attended before an Income-tax authority on behalf of any assessee otherwise than in the capacity of an employee or relative of that assessee ;
- (b) any person who has passed any accountancy examination recognised in this behalf by the Central Board of Revenue ; or
- (c) any person who has acquired such educational qualifications as the Central Board of Revenue may prescribe for this purpose.

(3) No person who has been dismissed from Government service after the first day of April, 1938, shall be qualified to represent an assessee under sub-section (1) ; and if any lawyer or registered accountant is found guilty of misconduct in connection with any income-tax proceedings by the authority empowered to take disciplinary action against members of the profession to which he belongs, or if any other person is found guilty of such misconduct by the Commissioner of Income-tax, the Commissioner of Income-tax may direct that he shall be thenceforward disqualified to represent an assessee under sub-section (1) :

Provided that—

- (a) no such direction shall be made in respect of any person unless he is given a reasonable opportunity of being heard,
- (b) any person against whom such direction is made may, within one month of the making of the direction, appeal to the Central Board of Revenue to have the direction cancelled, and
- (c) no such direction shall take effect until one month from the making thereof or, when an appeal is preferred, until the disposal of the appeal.

Receipts to be given.

62. A receipt shall be given for any money paid or recovered under this Act.

Service of notices.

63. (1) A notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a Court, under the Code of Civil Procedure 1908.

(2) Any such notice or requisition may, in the case of a firm or a Hindu undivided family, be addressed to any member of the firm or to the manager, or any adult male member of the family and, in the case of any other association of persons be addressed to the principal officer thereof.

Place of assessment.

64. (1) Where an assessee carries on a business, profession, or vocation at any place, he shall be assessed by the Income-tax Officer of the area in which that place is situate or, where the business, profession or vocation is carried on in more places than one, by the Income-tax Officer of the area in which the principal place of his business, profession or vocation, is situate.

(2) In all other cases, an assessee shall be assessed by the Income-tax Officer of the area in which he resides.

(3) Where any question arises under this Section as to the place of assessment, such question shall be determined by the Commissioner, or, where the question is between place in more provinces than one, by the Commissioners concerned, or, if they are not in agreement, by the Central Board of Revenue :

Provided that, before any such question is determined, the assessee shall have had an opportunity of representing his views.

Provided further that the place of assessment shall not be called in question by an assessee if he has made a return in response to the notice under sub-section (1) of Section 22 and has stated therein the principal place wherein he carries on his business, profession or vocation, or if he has not made such a return shall not be called in question after the expiry of the time allowed by the notice under sub-section (2) of Section 22 or under Section 34 for the making of a return :

Provided further that if the place of assessment is called in question by an assessee the Income-tax Officer shall, if not

satisfied with the correctness of the claim, refer the matter for determination under this sub-section before assessment is made.

(4) Notwithstanding anything contained in this Section, every Income-tax Officer shall have all the powers conferred by or under this Act on an Income-tax Officer in respect of any income, profits or gains accruing or arising or received within the area for which he is appointed.

(5) *The provisions of sub-section (1) and sub-section (2) shall not apply and shall be deemed never at any time to have applied to any assessee—*

**(a) on whom an assessment or reassessment for the purposes of this Act has been, is being or is to be made in the course of any case in respect of which a Commissioner of Income-tax appointed without reference to area under sub-section (2) of Section 5 is exercising the functions of a Commissioner of Income-tax, or*

(b) where by any distribution or allocation of work made by the Commissioner of Income-tax under sub-section (5) of Section 5, a particular Income-tax Officer has been charged with the function of assessing that assessee, or

(c) who or whose income is included in a class of persons or a class of incomes specified in any notification issued under sub-section (6) of section 5,

but the assessment of such person, whether the proceedings for such assessment began before or after the 1st day of April 1939, shall be made by the Income-tax Officer for the time being charged with the function of making such assessment by the Central Board of Revenue or by the Commissioner of Income-tax to whom he is subordinate, as the case may be.

Indemnity.

65. Every person deducting, retaining or paying any tax in pursuance of this Act in respect of income belonging to another person is hereby indemnified for the deduction, retention or payment thereof.

* Inserted by the Amendment Act No. XII of 1940.

Statement of case by Commissioner to High Court.

66 (1) If, in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chapter VIII, a question of law arises, the Commissioner may, either on his own motion or on reference from any Income-tax authority subordinate to him, draw up a statement of the case and refer it with his own opinion thereon to the High Court.

(2) Within sixty days of the date on which he is served with notice of an order under Section 31 or Section 32, or of an order under Section 33 enhancing an assessment or otherwise prejudicial to him, the assessee in respect of whom the order was passed may, by application accompanied by a fee of one hundred rupees or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order and the Commissioner shall, within sixty days of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court :

Provided that a reference shall lie from an order under Section 33 only on a question of law arising out of that order itself, and not on a question of law arising out of a previous order under Section 31, revised by the order under Section 33 :

Provided further that, if, in exercise of his power of revision under Section 33, the Commissioner decides the question, or if the Commissioner rejects the application on the ground that it is time-barred or otherwise incompetent, or if, in exercise of his powers under sub-section (3), the Commissioner refuses to state the case, the assessee may within thirty days from the date on which he receives notice of the order passed by the Commissioner withdraw his application, and if he does so, the fee paid shall be refunded.

(3) If, on any application being made under sub-section (2), the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may within six months from the date on which he is served with notice of the refusal apply to the High Court, and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may

require the Commissioner to state the case and to refer it, and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly.

(3A), If, on any application being made under sub-section (2), the Commissioner rejects it on the ground that it is time-barred, the assessee may, within two months from the date on which he is served with notice of the order of the Commissioner, apply to the High Court, and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to treat the application as made within the time allowed under sub-section (2).

(4) If the High Court is not satisfied that the statements in a case referred under this Section are sufficient to enable it to determine the question raised thereby, the Court may refer the case back to the Commissioner by whom it was stated to make such additions thereto or alterations therein as the Court may direct in that behalf.

(5) The High Court upon the hearing of any such case shall decide the question of law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Commissioner by whom the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Commissioner shall dispose of the case accordingly, or, if the case arose on a reference from any income-tax authority subordinate to him, shall forward a copy of such judgment to such authority who shall dispose of the case conformably to such judgment.

(6) Where a reference is made to the High Court on the application of an assessee, the costs shall be in the discretion of the Court.

(7) Notwithstanding that a reference has been made under this Section to the High Court, income-tax shall be payable in accordance with the assessment made in the case :

Provided that, if the amount of an assessment is reduced as a result of such reference, the amount overpaid shall be refunded with such interest as the Commissioner may allow unless the High Court, on intimation given by the Commissioner

within thirty days of the receipt of the result of such reference that he intends to ask for leave to appeal to His Majesty in Council, makes an order authorising the Commissioner to postpone payment of such refund until the disposal of the appeal to His Majesty in Council.

(7A) Section 5 of the Indian Limitation Act, 1908, shall apply to an application to the High Court by an assessee under sub-section (8) or sub-section (3A).

(8) For the purposes of this Section "the High Court" means—

- (a) in relation to British Baluchistan, the High Court of Judicature at Lahore ;
- (b) in relation to the province of Ajmer-Merwara, the High Court of Judicature at Allahabad ; and
- (c) in relation to the province of Coorg, the High Court of Judicature at Madras.

References to be heard by Benches of High Courts, and appeal to lie in certain cases to Privy Council.

66A. (1) When any case has been referred to the High Court under Section 66, it shall be heard by a Bench of not less than two judges of the High Court, and in respect of such case the provisions of Section 98 of the Code of Civil Procedure, 1908 shall, so far as may be, apply notwithstanding anything contained in the Letters Patent of any High Court established by Letters Patent or in any other law for the time being in force.

Provided that where in any reference heard by the Bench of the Court of the Judicial Commissioner of the North-West Frontier Province, a difference of opinion arises between the Judicial Commissioner and the Judge of the said Court, the opinion of the Judicial Commissioner shall prevail.

(2) An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under Section 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council.

(3) The provisions of the Code of Civil Procedure, 1908, relating to appeals to His Majesty in Council shall, so far as

may be, apply in the case of appeals under this Section in like manner as they apply in the case of appeals from decrees of a High Court :

Provided that nothing in this sub-section shall be deemed to affect the provisions of sub-section (6) or sub-section (7) of Section 66 :

Provided further that the High Court may, on petition made for the execution of the order of His Majesty in Council in respect of any costs awarded thereby, transmit the order for execution to any Court subordinate to the High Court.

(4) Where the judgment of the High Court is varied or reversed in appeal under this Section, effect shall be given to the order of His Majesty in Council in the manner provided in sub-sections (5) and (7) of Section 66 in the case of judgment of the High Court.

(5) Nothing in this Section shall be deemed—

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals, to His Majesty in Council, or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, to their conduct before the said Judicial Committee.

Bar of suits in Civil Court.

67. No suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act, and no prosecution, suit or other proceeding shall lie against any Officer of the Crown for anything in good faith done or intended to be done under this Act.

Computation of periods of limitation.

67 A. In computing the period of limitation prescribed for an appeal under this Act or for an application under Section 66, the day on which the order complained of was made, and the time requisite for obtaining a copy of such order, shall be excluded.

Act to have effect pending legislative provision for charge of income-tax.

67 B.* *If on the 1st day of April in any year provision has not yet been made by an Act of the Indian Legislature for the charging of income-tax for that year, this Act shall nevertheless have effect until such provision is so made as if the provision in force in the preceding year or the provision proposed in the Bill then before the Legislature, whichever is more favourable to the assessee, were actually in force.*

68. *(Repeals) Repealed by the Repealing Act, 1927 (12 of 1927).*

(Schedule.—Rules for the computation of the Profits and Gains of Insurance Business.)

THE SCHEDULE.

SEE SECTION 10 (7)

Rules for the Computation of the Profits and Gains of Insurance Business.

1. In the case of any person who carries on, or at any time in the preceding year carried on, life insurance business, the profits and gains of such person from that business shall be computed separately from his income, profits or gains from any other business.

2. The profits and gains of life insurance business shall be taken to be either—

(a) the gross external incomings of the preceding year from that business less the management expenses of that year, or

(b) the annual average of the surplus arrived at by adjusting the surplus or deficit disclosed by the actuarial valuation made for the last inter-valuation period ending before the year for which the assessment is to be made, so as to exclude from it any surplus or deficit included therein which was made in any earlier inter-valuation period and any expenditure other than expenditure which may under the provisions of Section 10 of this Act be allowed for in computing the profits and gains of a business,

whichever is the greater :

* Inserted by the Amendment Act No. XII, of 1940.

Provided that the amount to be allowed as management expenses shall not exceed—

- (a) $7\frac{1}{2}$ per cent. of the premiums received during the preceding year in respect of single premium life insurance policies, *plus*
- (b) in respect of the first year's premiums received in respect of other life insurance policies for which the number of annual premiums received is less than twelve, or for which the number of years during which premiums are payable is less than twelve, for each such premium or each such year $7\frac{1}{2}$ per cent. of such first year's premiums received during the preceding year, *plus*
- (c) 85 per cent. of the first year's premiums received during the preceding year in respect of other life insurance policies and $8\frac{1}{2}$ per cent. of other premiums received during that year in respect of all life insurance policies other than single premium life insurance policies,

3. In computing the surplus for the purpose of Rule 2,—

- (a) one half of the amounts paid to or reserved for or expended on behalf of policy-holders shall be allowed as a deduction :

Provided that in the first such computation made under this rule of any such surplus no account shall be taken of any such amounts to the extent to which they are paid out of or in respect of any surplus brought forward from a previous inter-valuation period :

Provided further that if any amount so reserved for policy-holders ceases to be so reserved, and is not paid to or expended on behalf of policy-holders, one-half of such amount, if it has been previously allowed as a deduction, shall be treated as part of the surplus for the period in which the said amount ceased to be so reserved ;

any amount either written off or reserved in the accounts or through the actuarial valuation balance sheet to meet depreciation of or loss on the realisation of securities or other assets, shall be allowed as a deduction, and any sums taken credit for in the accounts or actuarial valuation balance sheet on account of appreciation of or gains on the realisation of the securities or other assets shall be included in the surplus :

Provided that if upon investigation it appears to the Income-tax Officer after consultation with the Superintendent of Insurance that having due regard to the necessity for making reasonable provision for bonuses to participating policyholders and for contingencies, *the rate of interest or other factor employed in determining the liability in respect of outstanding policies is materially inconsistent with the valuation of the securities and other assets so as artificially to reduce the surplus*, such adjustment shall be made to the allowance for depreciation of, or to the amount to be included in the surplus in respect of appreciation of, such securities and other assets, as shall increase the surplus for the purposes of these rules to a figure which is fair and just ;

- (c) the whole amount of interest received in respect of any securities of the Central Government which have issued or declared to be income-tax free shall be deducted.

4. Where for any year an assessment is made in accordance with the annual average of a surplus disclosed by a valuation for an inter-valuation period exceeding twelve months, then, in computing the tax payable for that year, credit shall not be given in accordance with sub-section (5) of Section 18 for the tax paid in the preceding year, but credit shall be given for the annual average of the income-tax paid by deduction at source from interest on securities or otherwise during such period.

5. For the purposes of these rules—

- (i) 'preceding year' means that year for which annual

accounts are required to be prepared under the Insurance Act, 1938, immediately preceding the year for which the assessment is to be made or until the commencement of the Insurance Act 1938, the previous year as defined in Section 2 of this Act ;

- (ii) 'gross external incomings' means the full amount of incomings from interest, dividends, fines and fees and all other incomings from whatever source derived (except premiums received from policyholders and interest and dividends on any annuity fund) and includes also profits from reversions and on the sale or the granting of annuities, but excludes profits on the realisation of securities :

Provided that incomings, including the annual value of the property occupied by the assessee, which but for the provisions of sub-section (7) of Section 10 would have been assessable under Section 9 shall be computed upon the basis laid down in the last named Section, and that there shall be allowed from such gross incomings such deductions as are permissible under that Section.

- (iii) 'management expenses' means the full amount of expenses (including commissions) incurred exclusively in the management of business of life insurance, and in the case of a company carrying on other classes of business as well as the business of life insurance in addition thereto a fair proportion of the expenses incurred in the general management of the whole business. Bonuses or other sums paid to or reserved on behalf of policyholders, depreciation of, and losses on the realisation of securities and any expenditure other than expenditure which may under the provisions of Section 10 of this Act be allowed for in computing the profits and gains of a business are not management expenses for the purposes of these rules;

(iv) 'life insurance business' means life insurance business as defined in clause (11) of Section 2 of the Insurance Act, 1938;

(v) 'securities' includes stocks and shares.

6. The profits and gains of any business of insurance other than life insurance shall be taken to be the balance of the profits disclosed by the annual accounts, copies of which are required under the Insurance Act, 1938, to be furnished to the Superintendent of Insurance after adjusting such balance so as to exclude from it any expenditure other than expenditure which may under the provisions of Section 10 of this Act be allowed for in computing the profits and gains of a business. Profits and losses on the realisation of investments, and depreciation and appreciation of the value of investments shall be dealt with as provided in rule 3 for the business of life insurance.

7. The profits and gains of companies carrying on dividing society or assessment business shall be taken to be 15 per cent. of the premium income of the previous year, or in the case of non-resident companies 15 per cent. of the British Indian premium income of the previous year.

8. The profits and gains of the British Indian branches of an insurance company not resident in British India, in the absence of more reliable data, may be deemed to be the proportion of the total world income of the company corresponding to the proportion which its British Indian premium income bears to its total premium income. For the purpose of this rule, the total world income of life insurance companies not resident in British India whose profits are periodically ascertained by actuarial valuation shall be computed in the manner laid down in these rules for the computation of the profits and gains of life insurance business carried on in British India.

9. These rules apply to the assessment of the profits of any business of insurance carried on by a mutual insurance company.

United Kingdom Excess Profits Tax.

Extract from the English Finance Act No. 2 of 1915.

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Charge of Excess Profits Duty.

38. (1) There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this part of this Act applies, in any accounting period which ended after the fourth day of August nineteen hundred and fourteen, and before the first day of July nineteen hundred and fifteen, exceeded, by more than two hundred pounds, the pre-war standard of profits as defined for the purposes of this Part of this Act, a duty (in this Act referred to as "excess profits duty") of an amount equal to fifty per cent. of that excess.

(2) For the purposes of this Part of this Act the accounting period shall be taken to be the period for which the accounts of the trade or business have been made up, and where the accounts of any trade or business have not been made up for any definite period, or for the period for which they have been usually made up, or a year or more has elapsed without accounts being made up, shall be taken to be such period not being less than six months or more than a year ending on such a date as the Commissioners of Inland Revenue may determine.

Where any accounting period is a period of less than a year this Section shall have effect as if there were substituted for two hundred pounds a proportionately reduced amount.

(3) Where a person proves that in any accounting period, which ended after the fourth day of August nineteen hundred and fourteen, his profits have not reached the point which involves liability to excess profits duty, or that he has sustained a loss in his trade or business, he shall be entitled to repayment of such amount paid by him as excess profits duty in respect of any previous accounting period, or to set off against any excess profits duty payable by him in respect of any succeeding accounting period, such an amount as will make the total amount of excess profits duty paid by him during the whole period accord with his profits or losses during that period.

Trades and businesses to which excess profits duty applies.

39. The trades and businesses to which this Part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting—

- (a) husbandry in the United Kingdom; and
- (b) offices or employments; and
- (c) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount,

but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveller, or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency).

Determination of profits and pre-war standard.

40. (1) The profits arising from any trade or business to which this Part of this Act applies shall be separately determined for the purpose of this Part of this Act, but shall be so determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modifications set out in the First Part of the Fourth Schedule to this Act and to any other provisions of this Act.

(2) The pre-war standard of profits for the purposes of this Part of this Act shall, subject to the provisions of this Act, be taken to be the amount of the profits arising from the trade or business on the average of any two of the three last pre-war trade years, to be selected by the tax-payer (in this Part of this Act referred to as the profits standard): Provided that if it is shown to the satisfaction of the Commissioners of Inland

Revenue that that amount was less than the percentage standard as hereinafter defined, the pre-war standard of profits shall be taken to be the percentage standard.

The percentage standard shall, for the purposes of this Act, be taken to be an amount equal to the statutory percentage on the capital of the trade or business as existing at the end of the last pre-war trade year, subject, however, to the provisions of this Act as to any alteration in the manner of calculating the percentage standard in special cases.

The statutory percentage shall be six per cent. in the case of a trade or business carried on or owned by a company or other body corporate, and seven per cent. in the case of any other trade or business, subject, however, to the provisions of this Act as to the increase in that percentage in certain cases.

The provisions contained in the Second Part of the Fourth Schedule to this Act shall have effect with respect to the computation of the profits of a pre-war trade year, and the provisions contained in the Third Part of the Fourth Schedule shall have effect with respect to the ascertainment of capital for the purposes of this Part of this Act.

"The last pre-war trade year" means the year ending at the end of the last accounting period before the fifth day of August nineteen hundred and fourteen, and "the three last pre-war trade years" means the three years ending at the three corresponding times.

(3) Where it appears to the Commissioners of Inland Revenue, on the application of a taxpayer in any particular case, that any provisions of the Fourth Schedule to this Act should be modified in his case, owing to a change in the constitution of a partnership, or to the postponement or suspension, as a consequence of the present war, of renewals or repairs, or to exceptional depreciation or obsolescence of assets employed in the trade or business due to the present war, or to the necessity in connection with the present war of providing plant which will not be wanted for the purposes of the trade or business after the termination of the war, or to any other special circumstances specified in regulations made by the Treasury,

those Commissioners shall have power to allow such modifications of any of the provisions of that schedule as they think necessary in order to meet the particular case.

If the Commissioners refuse, on any such application, to allow any modification, or if the applicant is dissatisfied with any modification allowed, the applicant may require the Commissioners to refer the case to a Board of Referees, to be appointed for the purposes of this Part of this Act by the Treasury, and that Board shall consider any case so referred and have the same powers with respect thereto as the Commissioners have.

Adjustment for increased or decreased capital.

41. (1) Where capital has been increased during the accounting period, a deduction shall be made from the profits of the accounting period at the statutory percentage per annum on the amount by which the capital has been increased, for the whole accounting period if the increased capital has been employed for the whole accounting period, and if the increased capital has been employed for part only of the accounting period, for that part of the accounting period.

(2) Where capital has been decreased during the accounting period, an addition shall be made to the profits of the accounting period at the statutory percentage per annum on the amount by which the capital has been so decreased, for the whole accounting period, and if the capital has been decreased for the whole accounting period, and if the capital has been decreased for part only of the accounting period, for that part of the accounting period.

(3) For the purposes of this Section capital shall be taken to be increased or decreased, as the case may be, where the pre-war standard of profits is a profits standard, if the capital employed in the trade or business exceeds or is less than the average amount of capital employed during the pre-war trade years or year by reference to which the profits standard has been arrived at, and, where the pre-war standard of profits is a percentage standard, if the capital exceeds or is less than the capital on which the percentage standard has been calculated.

(4) Where any capital employed in a trade or business which was so employed for the first time within three years before the first day of August, nineteen hundred and fourteen has only commenced to be remunerative or fully remunerative in the accounting period, an amount equal to the statutory percentage, or where interest has been earned on the capital, but at a rate less than the statutory percentage, an amount which would bring the interest earned on the capital, up to the statutory percentage, as the case may be, shall be added to the profits standard.

Reference to the Board of Referees of questions as to increase of percentages, &c.

42. Where an application is made to the commissioners of Inland Revenue—

- (1) For an increase of the statutory percentage as respects any class of trade or business, or for a calculation of the percentage standard in the case of any class of trade or business in which the amount of capital actually employed in the trade or business is, owing to the nature of the trade or business, small compared with the capital necessarily at stake for that trade or business, by reference to some factor other than the capital of the trade or business or to some additional factor ; or
- (2) For an alteration of the pre-war standard of profits as respects capital employed for the purpose of the manufacture of war materials or for munitions work and which could not be expected to be remunerative or wholly remunerative, except in time of war, in a business which has been wholly or mainly carried on for those purposes ;

the Commissioners, unless they are of opinion that the application is frivolous or vexatious or relates to matters already decided by a Board of Referees, shall refer the case to a Board of Referees to be appointed for the purpose of this Part of this Act by the Treasury, and that Board shall deal with the case, and may, by order, if they think fit, increase the statutory percentage

or after the percentage standard for the class of trade or business the subject of the order, or alter the pre-war standard of profits, as the case requires.

On any such order being made, this Part of this Act shall have effect as from the date named in the order as if the percentage or standard named in the order was substituted for the percentage or standard fixed by this Act; and where, in pursuance of any such order, the statutory percentage is increased or the percentage standard is altered as respects any class of trade or business, the statutory percentage shall be increased and the percentage standard shall be altered respectively for all purposes of this Part of this Act as respects any trade or business belonging to that class.

This Section shall apply to any sub-division of a trade or business based either on any special feature of the trade or business or on locality as it applies to a class of trade or business, in any case where the Board of Referees are of opinion that the sub-division can properly be dealt with separately.

Excess mineral rights duty.

43. (1) Where the amount payable to any person as rent in respect of the right to work minerals or of any mineral wayleaves (in cases where the right to work the minerals and the mineral wayleaves are not part of the assets of any trade or business) varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war (in this Section referred to as the accounting year) exceeds the pre-war standard of that rent, there shall be paid as an addition to any mineral rights duty payable or paid, either directly or by deduction, by reference to the amount of the rent paid in that working year, by that person (in this Section referred to as the person liable) an amount equal to fifty per cent. of that excess.

(2) The pre-war standard of rent shall, for the purposes of this Section, be taken to be the average of any two of the three last pre-war rent values, to be selected by the taxpayer, and in cases where the minerals have not been worked or the wayleaves have not been let throughout the three years by reference to

which the three last pre-war rent values are to be calculated, or for any other reason there are no proper data for ascertaining the pre-war rent values, shall be taken to be such amount as may be fixed by the Commissioners of Inland Revenue, having regard to the data afforded by the working and price of minerals in like circumstances, subject nevertheless to the same appeal as that to which the assessment of duty by the Commissioners is subject under Part I of the Finance (1909-10) Act, 1910.

The pre war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year.

(3) Any amount payable in any accounting year by the lessee of minerals or wayleaves to a superior lessor as rent in respect of the minerals or wayleaves shall be treated as a deduction from the amount payable to the lessee as rent for that year, and in computing the pre-war rent values a corresponding deduction shall be made on account of any such rent.

(4) Any increment value duty payable annually under Section twenty-two of the Finance (1909-10) Act, 1910, shall, when paid, be treated as a deduction from the rent payable to any person in the year in which duty is paid, and a corresponding deduction shall be made in computing the pre-war standard with which the rent for that year is to be compared.

(5) Any duty payable under this Section shall be assessed by the Commissioners of Inland Revenue on the person liable, subject to the same appeal as that to which an assessment of duty by the Commissioners under Part I of the Finance (1909-10) Act, 1910, is subject, and shall be recoverable as a debt due to His Majesty from that person.

(6) Sub-section (3) of Section twenty of the Finance (1909-10) Act, 1910, shall extend so as to authorise particulars to be required of any lease of minerals or wayleaves and as to the sums paid or payable thereunder, and of such other particulars as to the minerals or wayleaves as the Commissioners may require for the purpose of this section.

(7) Expressions to which a special meaning is attached by Part I of the Finance (1909-10) Act, 1910, shall have the same meaning in this Section.

Returns for purpose of Part III and penalty for fictitious transactions.

44. (1) The Commissioners of Inland Revenue may, for the purposes of this Part of this Act, require any person engaged in any trade or business to which this Part of this Act applies, or who was so engaged during any accounting period or pre-war trade year, to furnish them within two months after the requirement for the return is made, with returns of the profits of the trade or business during the accounting period or pre-war trade years and such other particulars in connection with the trade or business as the Commissioners may require.

(2) It shall be the duty of every person chargeable to excess profits duty under this Part of this Act to give notice that he is chargeable to the Commissioners of Inland Revenue before the thirty-first day of January nineteen hundred and sixteen, and it shall be the duty of the liquidator of every company which is being wound up at the time of the commencement of this Act or is wound up after the commencement of this Act, and is chargeable to excess profits duty, to give notice of the fact to the Commissioners of Inland Revenue.

If any person fails to furnish a proper return in accordance with this Section or to comply with any requirement of the Commissioners under this Section, or to give any notice required by this Section, he shall be liable on summary conviction to a fine not exceeding one hundred pounds and to a further fine not exceeding ten pounds a day for every day during which the offence continues after conviction therefor.

(3) A person shall not, for the purpose of avoiding the payment of excess profits duty, enter into any fictitious or artificial transaction or carry out any fictitious or artificial operation, and, if he has entered into any such transaction or carried out any such operation before the commencement of this Act, shall inform the Commissioners of Inland Revenue of the nature of the transaction or operation.

If any person acts in contravention of, or fails to comply with, this provision, he shall be liable on summary conviction to a fine not exceeding one hundred pounds.

Supplemental provisions as to excess profits duty.

45. (1) The excess profits duty shall be assessed by the Commissioners of Inland Revenue, and shall be payable at any time, not being less than two months, after it is assessed.

The Commissioners may, in any case where they think fit, allow the duty to be paid in instalments of such amount payable at such times as the Commissioners direct.

(2) The duty may be assessed on any person for the time being owning or carrying on the trade or business or acting as agent for that person in carrying on the trade or business, or, where a trade or business has ceased, on the person who owned or carried on the trade or business or acted as agent in carrying on the trade or business immediately before the time at which the trade or business ceased and where there has been a change of ownership of the trade or business, the Commissioners of Inland Revenue, may, if they think fit, take the accounting period as the period ending on the date on which the ownership has so changed and assess the duty on the person who owned or carried on the trade or business or acted as agent for the person carrying on the trade or business at that date.

(3) The amount of duty payable shall be recoverable as a debt due to His Majesty from the person on whom it is assessed

Any such amount shall if it is less than fifty pounds be recoverable also summarily as a civil debt.

(4) Where a company is wound up after the commencement of this Act, and before the first day of July, nineteen hundred and sixteen, and the company would be chargeable with excess profits duty if the provisions of this Act were continued and extended to accounting periods ending before the first day of July, nineteen hundred and sixteen, it shall be the duty of the liquidator of the company to give notice to the Commissioners of Inland Revenue, and to set aside such sum out of the assets of the company as appears to the Commissioners of Inland

Revenue to be sufficient to provide for any such excess profits duty as may become chargeable.

(5) Any person who is dissatisfied with the amount of any assessment made upon him by the Commissioners of Inland Revenue under this Part of this Act may (except in cases where a special right of appeal is given under this Part of this Act) appeal to the general Commissioners for the division in which he is assessed, or to the special Commissioners, and those Commissioners shall have power on any appeal, if they think fit, to summon witnesses and examine them upon oath.

The power under Sections twenty-one and twenty-two of the Income Tax Act, 1853, to require an appeal in Ireland to the special Commissioners to be reheard by the County Court Judge, or Chairman of quarter sessions, or Recorder, shall apply to an appeal in Ireland under this provision.

Section fifty-nine of the Taxes Management Act, 1880 (which relates to the statement of a case on a point of law), shall apply with the necessary modifications in the case of any appeal to the general or special Commissioners under this Section, or of the rehearing of any such appeal in Ireland, and in the case of a reference to the Board of Referees under this Part of this Act, as it applies in the case of appeals to the general or special Commissioners under the Income Tax Acts.

(6) The duty assessed by the Commissioners of Inland Revenue shall be payable notwithstanding any appeal under this Section except in cases where the Commissioners of Inland Revenue direct to the contrary, but the Commissioners shall make such repayments, if any, as are necessary to give effect to any decision on appeal as soon as possible after such decision has been given.

(7) The Commissioners of Inland Revenue may make regulations with respect to the assessment and collection of the excess profits duty and the hearing of appeals under this Section, and may, by those regulations, apply and adapt any enactments relating to the assessment and collection of income-tax, or the hearing of appeals as to income-tax by the general or special Commissioners, which do not otherwise apply.

(8) All Commissioners and other persons employed for any purpose in connection with the assessment or collection of excess profits duty shall be subject to the same obligations as to secrecy with respect to excess profits duty as those persons are subject to with respect to income-tax, and any oath taken by any such person as to secrecy with respect to income-tax shall be deemed to extend also to secrecy with respect to excess profits duty.

FOURTH SCHEDULE.

PART I.

COMPUTATION OF PROFITS.

1. The profits shall be taken to be the actual profits arising in the accounting period; and the principle of computing profits by reference to any other year or an average of years shall not be followed.

2. The principle of the Income Tax Acts under which deductions are not allowed for interest on money borrowed for the purpose of the trade or business, or for rent, or royalties, or for other payments income tax on which is collected at the source (not being payments of dividends or payments for the distribution of profits), and under which profits or gains arising from lands, tenements, or hereditaments forming part of the assets of the trade or business are excluded shall not be followed.

3. Deductions for wear and tear or for any expenditure of a capital nature for renewals, or for the development of the trade or business or otherwise in respect of the trade or business, shall not be allowed except such as may be allowed under the Income Tax Acts, and if allowed shall be only of such amount as appears to the Commissioners of Inland Revenue to be reasonably and properly attributable to the year or accounting period.

4. Deductions shall not be allowed on account of the liability to pay, or the payment of, income tax or excess profits duty, but a deduction shall be allowed (if not otherwise allowed by means of the adoption of the principle of the Income Tax Acts) for any sum which has been paid in respect of the profits on account of

any excess profits duty or similar duty imposed in any country outside the United Kingdom.

5. Any deduction allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not, unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct, exceed the sums allowed for those purposes in the last pre-war trade year or a proportionate part thereof as the case requires, and no deduction shall be allowed in respect of any transaction or operation of any nature, where it appears, or to the extent to which it appears, that the transaction or operation has artificially reduced the amount to be taken as the amount of the profits of the trade or business for the purposes of this Act.

6. Where any company, either in its own name or that of a nominee, owns the whole of the ordinary capital of any other company carrying on the same trade or business or so much of that capital as under the general law a single shareholder can legally own, the provisions of Part III of this Act as to excess profits duty and the pre-war standard of profits shall apply as if that other company were a branch of the first-named company, and the profits of the two companies shall not be separately assessed.

7. Where in the case of any trade or business—

- (a) the percentage standard is adopted as the pre-war standard of profits ; and
- (b) the net result of the trade or business during the three last pre-war trade years has shown a loss ; and
- (c) any part of the profits has been applied in extinction of that loss ;

then in estimating the profits the deduction shall be allowed equal to the amount of profits so applied.

8. In estimating the profits no account shall be taken of income received from investments except in the case of life, assurance businesses and businesses where the principal business

consists of the making of investments. Where account is taken of any such income—

- (a) any variation in the value of any of those investments which appears to the Commissioners of Inland Revenue not to be due to a variation in profits shall also be taken into account; and
- (b) where the income has been derived from profits in respect of which any payment or repayment of excess profits duty has been made under this Act, such deduction or addition shall be made in computing the profits as will make proper allowance for that payment or repayment of duty.

9. In computing the total profits of a local authority from any trades or businesses carried on by that authority the total amount which is required to be raised by them, out of the rates or otherwise, for sinking fund purposes in connection with those trades or businesses shall be allowed as a deduction.

10. In the case of societies registered under the Industrial and Provident Societies Acts the excess profits duty shall be charged on the sum by which the profits per member for the accounting period (including any surplus arising from transactions with members) exceed the like profits per member in the pre-war trade year or average of years taken as the basis of computation for the purpose of the pre-war standard of profits, multiplied by number of members in the accounting period.

11. In the case of any contract extending beyond one accounting period from the date of its commencement to the completion thereof and only partially performed in any accounting period there shall (unless the Commissioners of Inland Revenue, owing to any special circumstances, otherwise direct) be attributed to each of the accounting periods in which such contract was partially performed, such proportion of the entire profits or loss or estimated profits or loss in respect of the complete performance of the contract as shall be properly attributable to such accounting periods respectively, having regard to the extent to which the contract was performed in such periods.

PART II.

PRE-WAR STANDARD.

1. The profits of any pre-war trade year shall be computed on the same principles and subject to the same provisions as the profits of the accounting period are computed.
- 2 Where the accounting period for which the excess profits duty is to be assessed is less than a year, the amount of the pre-war standard of profits shall be proportionately reduced.
3. Where it is shown to the satisfaction of the Commissioners of Inland Revenue in the case of any trade or business that the three last pre-war trade years have been years of abnormal depression, any four of the last six pre-war trade years may be substituted for the purposes of the pre-war standard of profits for any two of the three last pre-war trade years.

The three last pre-war trade years shall not be considered as years of abnormal depression unless the average profits of those years have been at least twenty-five per cent. lower than the average profits of the preceding three years.
4. Where owing to the recent commencement of a trade or business there have not been three pre-war trade years, but there have been two pre-war trade years, the pre-war standard of profits shall be taken to be the amount of the profits arising from the trade or business on the average of those two years or, at the option of the taxpayer, the profits arising from the trade or business during the last of those two years, and where there have not been two pre-war trade years, but there has been one pre-war trade year, the pre-war standard of profits shall be taken to be the profits arising from the trade or business during that year; and where there has not been one pre-war trade year, the pre-war standard of profits shall be taken to be the statutory percentage on the average amount of capital employed in the trade or business during the accounting period.

Where the trade or business is an agency or business of a nature involving capital of a comparatively small amount the pre-war standard of profits shall be computed by reference to the profits arising from any trade, business, office, employment or profession of any sort, whether liable to excess profits duty or

not, carried on by the agent or other person before his new trade or business commenced as if it was the same trade or business ; but only to the extent to which the income from the former trade, business, office, employment or profession has been diminished.

5. Where since the commencement of the three last pre-war trade years a trade or business has changed ownership, the provisions of this Part of this Schedule shall apply as if a new trade or business had been commenced on the change of ownership, except in cases when the taxpayer makes an application that the provisions of Part III of this Act and this Schedule should apply as if the trade or business had not changed ownership, but in that case such modifications (if any) shall be made in the application of this Schedule as may be necessary to make the basis on which the profits standard is computed the same as that on which the profits of the accounting period are computed.

6. It is hereby declared that, where any business or trade is confined to the management of any particular assets, but power exists to substitute other assets for those particular assets or any of them, such a substitution shall not be deemed, for the purposes of Part III of this Act, to constitute a change of ownership of the business ; but, where any such substitution has been carried out by the sale of assets and the purchase of other assets, the capital of the trade or business shall be taken to be increased or decreased, as the case may be, only by the amount of the difference between the price of the assets purchased and the price obtained for the assets sold, and the capital representing the assets purchased shall be estimated on the same basis for all the purposes of Part III of this Act.

PART III.

CAPITAL.

1. The amount of the capital of a trade or business shall, so far as it does not consist of money, be taken to be—

(a) so far as it consists of assets acquired by purchase, the price at which those assets were acquired, subject to any proper deductions for wear and tear or replacement, or for unpaid purchase money ; and

- (b) so far as it consists of assets being debts due to the trade or business, the nominal amount of those debts subject to any reduction which has been allowed in respect of those debts for income tax purposes ; and
- (c) so far as it consists of any other assets which have not been acquired by purchase, the value of the assets at the time when they became assets of the trade or business, subject to any proper deductions for wear and tear or replacement.

Nothing in this Part of this Schedule shall prevent accumulated profits employed in the business being treated as capital.

2. Any capital the income on which is not taken into account for the purposes of Part I of this Schedule, and any borrowed money or debts, shall be deducted in computing the amount of capital for the purposes of Part III of this Act.

3. Where any asset has been paid for otherwise than in cash, the cost price of that asset shall be taken to be the value of the consideration at the time the asset was acquired, but where a trade or business has been converted into a company and the shares in the company are wholly or mainly held by the person who was owner of the trade or business, no value shall be attached to those shares so far as they are represented by goodwill or otherwise than by material assets of the company unless the Commissioners of Inland Revenue in special circumstances otherwise direct. Patents and secret processes shall be deemed to be material assets.

Comparative table showing the various changes in the Excess Profits Tax Act, 1940 as enacted.

Bill as presented.	Bill as amended by the Select Committee.	The Act.
<p><i>A bill to impose a tax on excess profits arising out of certain businesses.</i></p> <p>WHEREAS it is expedient to impose a tax on excess profits arising out of certain businesses ;</p> <p>It is hereby enacted as follows :—</p> <p>Short title, extent and commencement.</p> <p>1. (1) This Act may be called the Excess Profits Tax Act, 1940.</p> <p>(2) It extends to the whole of British India.</p> <p>(3) It shall come into force on such date as the Central Government may,</p>	<p>(Words underlined or italicised indicate the amendments suggested by the Committee; asterisks indicate omissions).</p> <p><i>A bill to impose a tax on excess profits arising out of certain businesses.</i></p> <p>WHEREAS it is expedient to impose a tax on excess profits arising out of certain businesses in the conditions prevailing during the present hostilities;</p> <p>It is hereby enacted as follows :—</p> <p>Short title, extent and commencement.</p> <p>1. (1) This Act may be called the Excess Profits Tax Act, 1940.</p> <p>(2) It extends to the whole of British India.</p> <p>(3) It shall come into force on such date as the Central Government may,</p>	<p><i>An Act to impose a tax on excess profits arising out of certain businesses.</i></p> <p>WHEREAS it is expedient to impose a tax on excess profits arising out of certain businesses in the conditions prevailing during the present hostilities;</p> <p>It is hereby enacted as follows :—</p> <p>Short title, extent and commencement.</p> <p>1. (1) This Act may be called the Excess Profits Tax Act, 1940.</p> <p>(2) It extends to the whole of British India.</p> <p>(3) It shall come into force on such date as the Central Government may,</p>

by notification in the official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "accounting period" in relation to any business means—

(a) where the accounts of the business are made up for successive periods of twelve months, each of such periods ;

(b) in any other case, such period as the Excess Profits Tax Officer may determine :

Provided that in determining any accounting period under sub-clause (b) the Excess Profits Tax Officer shall have regard to the period, if any, which is, or has been, determined as the previous year for that business for the purposes of the Indian Income-tax Act, 1922 ;

by notification in the official Gazette, appoint.

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Provided that in determining any accounting period under sub-clause (b) the Excess Profits Tax Officer shall have regard to the period, if any, which is, or has been, determined as the previous year for that business for the purposes of the Indian Income-tax Act, 1922 ;

(2) "Appellate Assistant Commissioner" means a person appointed to be an Appellate Assistant Commissioner of Excess Profits Tax under Section 3;

(3) "average amount of capital" means the average amount of capital employed in any business as computed in accordance with the Second Schedule;

(4) "Board of Referees" means a Board of Referees appointed under Section 3;

(5) "business" includes any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture or any profession or vocation, but does not include a profession carried on by an individual or by individuals in partnership if the profits of the profession depend wholly or mainly on his or their personal qualifications unless such profession consists wholly or mainly in the making of contracts on behalf of other persons or the giving

(2) "Appellate Assistant Commissioner" means a person appointed to be an Appellate Assistant Commissioner of Tax under Section 3;

(3) "average amount of capital" means the average amount of capital employed in any business as computed in accordance with the Second Schedule;

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(5) "business" includes any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture or any profession or vocation but does not include a profession carried on by an individual or by individuals or by individuals in partnership if the profits of the profession depend wholly or mainly on his or their personal qualifications:

persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts :

Provided that for the purposes of this definition "profession" does not include any trade or business consisting wholly or mainly in the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts ;

Provided further that where the functions of a company or society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this definition to be a business carried on by such company or society ;

Provided further that all businesses to which this Act applies carried on by the same person shall be treated as the business for the purposes of this Act ;

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Provided that where the functions of a company or of a society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this definition to be a business carried on by such company or society ;

Provided further that all businesses to which this Act applies carried on by the same person shall be treated as one business for the purposes of this Act ;

- (6) "chargeable accounting period" means—
- (a) any accounting period beginning on or after the 1st day of April, 1939, and
- (b) so much of any accounting period beginning before that date as falls on or after that date;
- (7) "Commissioner" means a person appointed to be a Commissioner of Excess Profits Tax under Section 3;
- (8) "company" means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession, and includes any foreign association, and includes any foreign association,
- (6) "chargeable accounting period" means—
- (a) any accounting period falling wholly within the term beginning on** the 1st day of September, 1939, and ending on the 31st day of March, 1941, and
- (b) where any accounting period falls partly within and partly without the said term, such part of that accounting period as falls within the said term;
- (7) "Commissioner" means a person appointed to be a Commissioner of Excess Profits Tax under Section 3;
- (8) "Company" means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession or of a law of an Indian State, and
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tion whether incorporated or not which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act;

(9) "deficiency of profits" means—

(i) where profits have been made in any chargeable accounting period, the amount by which such profits fall short of the standard profits ;

(ii) where a loss has been made in any chargeable accounting period, the amount of the loss added to the amount of the standard profits ;

(10) "director" includes any person occupying the position of a director by whatever name called and also includes any person who—

(i) is a manager of the company or concerned in the management of the business ; and

includes any foreign association whether incorporated or not which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act ;

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| <p>(ii) is remunerated out of the funds of the business ; and</p> <p>(iii) is the beneficial owner of not less than twenty per cent. of the ordinary share capital of the company ;</p> <p>(11) "dividend" has the meaning assigned to the expression in Section 2 of the Indian Income-tax Act, 1922 ;</p> <p>(12) "Excess Profits Tax Officer" means a person appointed to be an Excess Profits Tax Officer under Section 3 ;</p> <p>(13) "income" has the meaning assigned to the expression in Section 2 of the Indian Income-tax Act, 1922 ;</p> <p>(14) "fixed rate" in relation to dividends on share capital, other than ordinary share capital, includes a rate fluctuating in accordance with the maximum rate of income-tax ;</p> <p>(15) "Inspecting Assistant Commissioner" means a person appointed to be an Inspecting Assistant Com-</p> | <p>(ii) is remunerated out of the funds of the business ; and</p> <p>(iii) is the beneficial owner of not less than twenty per cent. of the ordinary share capital of the company ;</p> <p>(11) "dividend" has the meaning assigned to the expression in Section 2 of the Indian Income-tax Act, 1922 ;</p> <p>(12) "Excess Profits Tax Officer" means a person appointed to be an Excess Profits Tax Officer under Section 3 ;</p> <p>(13) "income" has the meaning assigned to the expression in Section 2 of the Indian Income-tax Act, 1922 ;</p> <p>(14) "fixed rate" in relation to dividends on share capital, other than ordinary share capital, includes a rate fluctuating in accordance with the maximum rate of income-tax ;</p> <p>(15) "Inspecting Assistant Commissioner" means a person appointed to be an Inspecting Assistant Com-</p> | <p>(ii) is remunerated out of the funds of the business ; and</p> <p>(iii) is the beneficial owner of not less than twenty per cent. of the ordinary share capital of the company ;</p> <p>(11) "dividend" has the meaning assigned to the expression in Section 2 of the Indian Income-tax Act, 1922 ;</p> <p>(12) "Excess Profits Tax Officer" means a person appointed to be an Excess Profits Tax Officer under Section 3 ;</p> <p>(13) "income" has the meaning assigned to the expression in Section 2 of the Indian Income-tax Act, 1922 ;</p> <p>(14) "fixed rate" in relation to dividends on share capital, other than ordinary share capital, includes a rate fluctuating in accordance with the maximum rate of income-tax ;</p> <p>(15) "Inspecting Assistant Commissioner" means a person appointed to be an Inspecting Assistant Com-</p> |
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<p>missioner of Excess Profits Tax under Section 3;</p> <p>(16) "loss" means a loss computed in the same manner as, for the purposes of this Act, profits are to be computed;</p> <p>(17) "ordinary share capital" means, except in the provisions of this Act relating to subsidiary companies, all the issued share capital (by whatever name called) of the company, other than capital the holders whereof have a right to a dividend at a fixed rate;</p> <p>(18) "person" includes a Hindu undivided family;</p> <p>(19) "prescribed" means prescribed by rule made under this Act;</p> <p>(20) "profits" means profits as determined in accordance with the First Schedule;</p>	<p>missioner of Excess Profits Tax under Section 3;</p> <p>(16) "loss" means a loss computed in the same manner as, for the purposes of this Act, profits are to be computed;</p> <p>(17) "ordinary share capital" means, except in the provisions of this Act relating to subsidiary companies, all issued share capital (by whatever name called) of the company, other than capital the holders whereof have a right to a dividend at a fixed rate;</p> <p>(19) "person" includes a Hindu undivided family;</p> <p>(19) "prescribed" means prescribed by rules made under this Act;</p> <p>(20) "profits" means profits as determined in accordance with the First Schedule;</p>	<p>missioner of Excess Profits Tax under Section 3;</p> <p>(16) "loss" means a loss computed in the same manner as, for the purposes of this Act, profits are to be computed;</p> <p>(17) "person" includes a Hindu undivided family;</p> <p>(18) "prescribed" means prescribed by rules made under this Act;</p> <p>(19) "profits" means profits as determined in accordance with the First Schedule;</p>
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(21) "standard profits" means standard profits as computed in accordance with the provisions of Section 6;

(22) "statutory percentage" means—

(a) in relation to a business carried on by a body corporate (other than a company the directors whereof have a controlling interest therein), eight per cent. per annum;

(b) in relation to any other business, ten per cent. per annum;

Provided that in relation to any decrease of capital the statutory percentage shall be in all cases six per cent.;

(21) "standard profits" means standard profits as computed in accordance with the provisions of Section 6;

(22) "statutory percentage" means—

(a) in relation to a business carried on by a body corporate (other than a company the directors whereof have a controlling interest therein), eight per cent. per annum;

(b) in relation to any other business, ten per cent. per annum;

Provided that in relation to any decrease of capital the statutory percentage shall be in all cases six per cent.;

Provided further that where the business was commenced on or after the 1st day of December, 1938, the foregoing percentages shall be increased by two per cent. in each case.

(20) "standard profits" means standard profits as computed in accordance with the provisions of Section 6;

(21) "statutory percentage" means—

(a) in relation to a business carried on by a body corporate (other than a company the directors whereof have a controlling interest therein), eight per cent. per annum;

(b) in relation to any other business, ten per cent. per annum;

Provided that in relation to any decrease of capital the statutory percentage shall be in all cases six per cent.;

Provided further that where the business was commenced on or after the 1st day of July, 1938, the foregoing percentages shall be increased from eight, ten and six per cent. to ten,

twelve and eight per cent. respectively ;

(23) "written down value" has the meaning assigned to that expression in sub-section (5) of Section 10 of the Indian Income-tax Act, 1922.

(23) "written down value" means, in relation to any building, machinery or plant used for the purposes of the business, the original cost of such building, machinery or plant to the person carrying on the business during the accounting period for the purposes of which the written down value has to be determined reduced by an allowance for depreciation for all the years prior to the said accounting period since the building, machinery or plant in question was purchased or acquired by such person calculated for each of those years at the rates laid down in clause (c) of sub-section (5) of Section 10 of the Indian Income-Act, 1922 :

Provided that such deduction shall be made whether or not any deduction was made or was due to be made under the Income-tax Act, 1922, in arriving at the written down value for the purposes of that Act.

(22) "written down value" has the meaning assigned to that expression in sub-section (5) of Section 10 of the Indian Income-tax Act, 1922.

Excess profits tax authorities.

3. (1) There shall be the following classes of excess profits tax authorities for the purposes of this Act, namely:—

- (a) the Central Board of Revenue;
- (b) the Commissioners of Excess Profits Tax;
- (c) Assistant Commissioners of Excess Profits Tax, who may be either Appellate Assistant Commissioners of Excess Profits Tax or Inspecting Assistant Commissioners of Excess Profits Tax;
- (d) Excess Profits Tax Officers;
- (e) Boards of Referees.

(2) Every Commissioner of Excess Profits Tax, Appellate Assistant Commissioner of Excess Profits Tax, Inspecting Assistant Commissioner of Excess Profits Tax and Excess Profits Tax Officer shall be a person who is

Excess profits tax authorities.

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- (a) the Central Board of Revenue;
- (b) the Commissioners of Excess Profits Tax;
- (c) Assistant Commissioners of Excess Profits Tax, who may be either Appellate Assistant Commissioners of Excess Profits Tax or Inspecting Assistant Commissioners of Excess Profits Tax;
- (d) Excess Profits Tax Officers;
- (e) Boards of Referees.

(2) Every Commissioner of Excess Profits Tax, Appellate Assistant Commissioner of Excess Profits Tax, Inspecting Assistant Commissioner of Excess Profits Tax and Excess Profits Tax Officer shall be a person who is

Excess profits tax authorities.

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- (a) the Central Board of Revenue;
- (b) the Commissioners of Excess Profits Tax;
- (c) Assistant Commissioners of Excess Profits Tax, who may be either Appellate Assistant Commissioners of Excess Profits Tax or Inspecting Assistant Commissioners of Excess Profits Tax;
- (d) Excess Profits Tax Officers;
- (e) Boards of Referees.

(2) Every Commissioner of Excess Profits Tax, Appellate Assistant Commissioner of Excess Profits Tax, Inspecting Assistant Commissioner of Excess Profits Tax and Excess Profits Tax Officer shall be a person who is

exercising the functions of Commissioner of Income-tax, Appellate Assistant Commissioner of Income-tax, Inspecting Assistant Commissioner of Income-tax and Income-tax Officer, respectively, under the Indian Income-tax Act, 1922.

(3) The Central Board of Revenue shall, subject to the provisions of sub-section (2), appoint such persons as Commissioners of Excess Profits Tax, Appellate Assistant Commissioners of Excess Profits Tax, Inspecting Assistant Commissioners of Excess Profits Tax and Excess Profits Tax Officers as it thinks fit and such persons shall perform their functions in respect of such cases as the Central Board of Revenue may assign to them :

Provided that such directions shall be made entirely at the discretion of the Central Board of Revenue, and, in particular, it shall be competent for that Board to assign a case or class of cases to an officer who is not exercising in respect of that case or class of cases the corresponding functions in

exercising the functions of Commissioner of Income-tax, Appellate Assistant Commissioner of Income-tax, Inspecting Assistant Commissioner of Income-tax Officer, respectively, under the Indian Income-tax Act, 1922.

(3) The Central Board of Revenue shall, subject to the provisions of sub-section (2), appoint such persons as Commissioner of Excess Profits Tax, Appellate Assistant Commissioners of Excess Profits Tax, Inspecting Assistant Commissioners of Excess Profits Tax and Excess Profits Tax Officers as it thinks fit and such persons shall perform their functions in respect of such cases as the Central Board of Revenue may assign to them :

Provided that such directions shall be made entirely at the discretion of the Central Board of Revenue, and, in particular, it shall be competent for that Board to assign a case or class of cases to an officer who is not exercising in respect of that case or class of cases the corresponding functions in relation

exercising the functions of Commissioner of Income-tax, Appellate Assistant Commissioner of Income-tax, Inspecting Assistant Commissioner of Income-tax and Income-tax Officer, respectively, under the Indian Income-tax Act, 1922.

(3) The Central Board of Revenue shall, subject to the provisions of sub-section (2), appoint such persons as Commissioners of Excess Profits Tax, Appellate Assistant Commissioners of Excess Profits Tax, Inspecting Assistant Commissioners of Excess Profits Tax and Excess Profits Tax Officers as it thinks fit and such persons shall perform their functions in respect of such cases as the Central Board of Revenue may assign to them :

Provided that such directions shall be made entirely at the discretion of the Central Board of Revenue, and, in particular, it shall be competent for that Board to assign a case or class of cases to an officer who is not exercising in respect of that case or class of cases the corresponding functions in

relation to the charge of income-tax under the Indian Income-tax Act, 1922.

(4) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue :

Provided that nothing in this sub-section applies to a Board of Referees :

Provided further that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions.

(5) A Board of Referees shall consist of not less than three and not more than five persons, of whom not less than one half shall be non-officials having business experience, and one shall be a judicial officer who has exercised the power of a District Judge or who possesses such qualifications as are normally required for appointment to the post of District Judge,

to the charge of income-tax under the Indian Income-tax Act, 1922.

(4) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue :

Provided that nothing in this sub-section applies to a Board of Referees :

Provided further that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions.

(5) A Board of Referees shall consist of not less than three and not more than five persons, of whom not less than one-half shall be non-officials having business experience, and one shall be a judicial officer who has exercised the powers of a District Judge or who possesses such qualifications as are normally required for

relation to the charge of income-tax under the Indian Income-tax Act, 1922.

(4) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue.

(5) A Board of Referees shall consist of not less than three and not more than five persons, of whom not less than one-half shall be non-officials having business experience, and one shall be a judicial officer not inferior in rank to a Subordinate Judge or a Judge of a Small Cause Court who has held judicial office for a period of not less than ten years.

appointment to the post of District Judge, and who has held judicial office for a period of not less than ten years.

(6) Subject to the provisions of sub-section (5), the Central Board of Revenue may make rules regulating the formation, composition and procedure of Boards of Referees.

Charge of tax.

4. Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid on the amount by which the profits during any chargeable accounting period exceed the standard profits a tax (in this Act referred to as "excess profits tax") equal to fifty per cent. of that excess:

(6) Subject to the provisions of sub-section (5), the Central Government may make rules regulating the formation, composition and procedure of Boards of Referees.

Charge of tax.

4. Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid on the amount by which the profits during any chargeable accounting period exceed the standard profits a tax (in this Act referred to as "excess profits tax") which shall up to the 31st day of March, 1941, be equal to fifty per cent. of that excess and shall after that date be equal to such percentage of that excess as may be fixed by the Annual Finance Act:

and who has held judicial office for period of not less than ten years.

(6) Subject to the provisions of sub-section (5), the Central Government may make rules regulating the formation, composition and procedure of Board of Referees.

Charge of tax.

4. Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid on the profits during any chargeable accounting period exceed the standard profits a tax (in this Act referred to as "excess profits tax") which shall, in respect of any chargeable accounting period ending on or before the 31st day of March, 1941, be equal to fifty per cent. of that excess and shall, in respect of any chargeable accounting period beginning after that date, be equal to such percentage of that excess as

may be fixed by the annual Finance Act :

Provided that any profits which are, under the provisions of sub-section (3) of Section 4 of the Indian Income-tax Act, 1922, exempt from income-tax, and all profits from any business of life insurance shall be totally exempt from excess profits tax under this Act.

Application of Act.

5. This Act shall apply to every business of which any part of the profits made during the chargeable accounting period is chargeable to income-tax by virtue of the provisions of sub-clause (i) or sub-clause (ii) of clause (b) of sub-section (1) of Section 4 of the Indian Income-tax Act, 1922, or of clause (c) of that sub-section :

Provided that this Act shall not apply to any business the whole of the profits of which accrue or arise without British India where such business is carried on by or on behalf of a person who is resident but not ordinarily

Provided that any profits which are, under the provision of sub-section (3) of Section 4 of the Indian Income Tax Act, 1922, exempt from income-tax, and all profits from any business of life insurance shall be totally exempt from excess profits tax under this Act.

Application of Act.

5. This Act shall apply to every business of which any part of the profits made during the chargeable accounting period is chargeable to income-tax by virtue of the provisions of sub-clause (i) or sub-clause (ii) of clause (b) of sub-section (1) of Section 4 of the Indian Income-tax Act, 1922, or of clause (c) of that sub-section :

Provided that this Act shall not apply to any business the whole of the profits of which accrue or arise without British India where such business is carried on by or on behalf of a person who is resident but not ordinarily

Provided that any profits which are, under the provisions of sub-section (3) of Section 4 of the Indian Income-tax Act, 1922, exempt from income-tax, shall be totally exempt from Excess Profits Tax under this Act.

Application of Act.

5. This Act shall apply to every business of which any part of the profits is chargeable to income-tax by virtue of the provisions of sub-clause (i) or sub-clause (ii) of clause (b) of sub-section (1) of Section 4 of the Indian Income-tax Act, 1922, or of clause (c) of that sub-section :

*Provided that this Act shall not apply to any business the whole of the profits of which accrue or arise without British India where such business is carried on by or on behalf of a person who is resident but not

ordinarily resident in British India unless the business is controlled in India :

Provided further that where a part only of the profits of a business carried on by a person who is not resident in British India or not ordinarily so resident accrues or arises in British India or is deemed under the Indian Income-tax Act, 1922, so to accrue or arise, then, except where the business being the business of a person who is resident but not ordinarily resident in British India is controlled in India, this Act shall apply only to such part of the business, and such part shall for all the purposes of this Act be deemed to be a separate business.

Standard profits.

6. (1) For the purposes of this Act, the standard profits of a business in relation to any chargeable accounting period shall, subject to the provisions of sub-sections (3) and (4), be—

(a) where the business was in

resident in British India unless the business is controlled in India :

Provided further that where a part only of the profits of a business carried on by a person who is not resident in British India or not ordinarily so resident accrues or arises in British India or is deemed under the Indian Income-tax Act, 1922, so to accrue or arise, then, except where the business being the business of a person who is resident but not ordinarily resident in British India is controlled in India, this Act shall apply only to such part of the business, and such part shall for all the purposes of this Act be deemed to be a separate business.

Standard profits.

6. (1) For the purposes of this Act, the standard profits of a business in relation to any chargeable accounting period shall, subject to the provisions of sub-sections (3) and (4), be—

resident in British India unless the business is controlled in India :

Provided further that where the profits of a part only of a business carried on by a person who is not resident in British India or not ordinarily so resident accrue or arise in British India or are deemed under the Indian Income-tax Act, 1922, so to accrue or arise, then, except where the business being the business of a person who is resident but not ordinarily resident in British India is controlled in India, this Act shall apply only to such part of the business, and such part shall for all the purposes of this Act be deemed to be a separate business.

Standard profits.

6. (1) For the purposes of this Act, the standard profits of a business in relation to any chargeable accounting period shall, subject to the provisions of sub-sections (3) and (4), be an amount bearing to the profits of the business during the standard period, if

existence before the 31st day of March, 1936, an amount bearing to the profits of the business during the standard period the same proportion as the chargeable accounting period bears to the standard period; provided that if the average amount of capital employed in the business during such chargeable accounting period is greater or less than the average amount of capital employed during the standard period, such amount shall be increased or decreased, as the case may be, by an amount calculated by applying the statutory percentage to the amount of such increase or decrease;

(b) in any other case, an amount calculated by applying the statutory percentage to the average amount of capital employed in the business during such chargeable accounting period.

if in respect of that business a standard period is available, the same proportion as the chargeable accounting period bears to the standard period:

Provided that if the average amount of capital employed in the business during such chargeable accounting period is greater or less than the average amount of capital employed during the standard period, such amount shall be increased or decreased, as the case may be, by an amount calculated by applying the statutory percentage to the amount of such increase or decrease:

Provided further that in the case of a business which was not in existence before the 31st day of March, 1936, the standard profits shall, at the option of the person carrying on the business, be an amount calculated by applying the statutory percentage to the average amount of capital employed in the business during such chargeable accounting period.

in respect of that business a standard period is available, the same proportion as the chargeable accounting period bears to the standard period:

Provided that if the average amount of capital employed in the business during such chargeable accounting period is greater or less than the average amount of capital employed during the standard period, such amount shall be increased or decreased, as the case may be, by an amount calculated by applying the statutory percentage to the amount of such increase or decrease:

Provided further that in the case of a business which was commenced on or after the 31st day of March, 1936, the standard profits shall, at the option of the person carrying on the business, be an amount calculated by applying the statutory percentage to the average amount of capital employed in the business during such chargeable accounting period.

(2) For the purposes of this Section the standard period shall, at the option of the person carrying on the business, be—

(a) the "previous year" as determined under Section 2 of the Indian Income-tax Act, 1922, for the purpose of the income-tax assessment for the year ending on the 31st day of March, 1937, or the previous year as so determined for the year ending on the 31st day of March, 1938; or

(b) the "previous year" as so determined for the year ending on the 31st day of March, 1937, and that for the year ending on the 31st day of March, 1939; or

(c) the "previous year" as so determined for the year ending on the 31st day of March, 1938, and that for the year ending on the 31st day of March, 1939; or

(2) For the purposes of this Section the standard period shall, at the option of the person carrying on the business, be—

(a) the "previous year" as determined under Section 2 of the Indian Income-tax Act, 1922, for the purpose of the income-tax assessment for the year ending on the 31st day of March, 1937, or the previous year as so determined for the year ending on the 31st day of March 1938; or

(b) the "previous year" as so determined for the year ending on the 31st day of March, 1937, and that for the year ending on the 31st day of March, 1939; or

(c) the "previous year" as so determined for the year ending on the 31st day of March, 1938, and that for the year ending on the 31st day of March, 1939; or

(2) For the purposes of this Section the standard period shall, at the option of the person carrying on the business, be—

(a) the "previous year" as determined under Section 2 of Indian Income-tax Act, 1922, for the purpose of the income-tax assessment for the year ending on the 31st day of March, 1937, or the previous year as so determined for the year ending on the 31st day of March, 1938; or

(b) the "previous year" as so determined for the year ending on the 31st day of March, 1937, and that for the year ending on the 31st day of March, 1939, or

(c) the "previous year" as so determined for the year ending on the 31st day of March, 1938, and that for the year ending on the 31st day of March, 1939.

(d) the previous year as so determined for the year ending on the 31st day of March, 1939, and that for the year ending on the 31st day of March 1940 :

Provided that in no case shall any period of less than nine months be taken as a standard period.

(3) If, within the period specified in the notice issued under sub-section (1) of Section 13, the person carrying on the business, being a business to which clause (a) of sub-section (1) applies, makes an application to the Excess Profits Tax Officer in this behalf, the Excess Profits Tax Officer shall refer the application to the Board of Referees, and if the Board is satisfied that during the standard period the profits of the business were less than might have been expected, it may direct that the standard profits shall be computed as if the profits during the standard period were such greater amount as it thinks just :

(d) the "previous year" as so determined for the year ending on the 31st day of March, 1939, and that for the year ending on the 31st day of March, 1940 :

Provided that in no case shall any period of less than nine months be taken as a standard period.

(3) If, within the period specified in the notice issued under sub-section (1) of Section 13, the person carrying on the business makes an application to the Excess Profits Tax Officer in this behalf, the Excess Profits Tax Officer shall refer the application to the Board of Referees, and if the Board is satisfied that during the standard period the profits of the business were less than might at the beginning of that period have been reasonably expected, it may direct that the standard profits shall be computed as if the profits during the standard period were such greater amount as it thinks just :

Provided that where the person carrying on the business is a company such amount shall not exceed the amount sufficient to provide dividends for the standard period—

(a) on the paid up ordinary share capital of the company, at the rate of six per cent per annum;

(b) on any other paid up share capital of the company, at the fixed rate per annum payable thereon,

unless the Board is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed.

(4) The standard profits shall be taken to be rupees twenty thousand in any case in which the standard profits computed in accordance with sub-section (1) are less than this sum :

Provided that if the chargeable accounting period is greater or less than one year the sum of rupees twenty thousand shall for the purpose of this

Provided that * * * such amount shall not exceed the statutory percentage of the capital employed in the business unless the Board is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed.

Provided that such amount shall not exceed the statutory percentage of the average amount of the capital employed in the business unless the Board is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed.

(4) The standard profits shall be taken to be rupees thirty-six thousand in any case in which the standard profits computed in accordance with sub-section (1) are less than this sum :

Provided that if the chargeable accounting period is greater or less than one year the sum of rupees thirty-six thousand shall for the purpose of

sub-section be increased or decreased proportionately.

(5) Where the standard period includes any period prior to the commencement of Part III of the Government of India Act, 1935, during which Burma was part of British India, there shall, in computing the standard profits of a business under this Section, be excluded from the profits of the business during the standard period so much of such profits as arose or accrued or were received in Burma unless such profits are also included in the profits of the business during the chargeable accounting period.

Relief on occurrence of deficiency of profits.

7. Where a deficiency of profits occurs in any chargeable accounting period in any business, the profits of the business chargeable with excess profits tax shall be deemed to be reduced and relief shall be granted in accordance with the following provisions :—

sub-section be increased or decreased proportionately.

(5) Where the standard period includes any period prior to the commencement of Part III of the Government of India Act, 1935, during which Burma was part of British India, there shall, in computing the standard profits of a business under this Section, be excluded from the profits of the business during the standard period so much of such profits as arose or accrued or were received in Burma unless such profits are also included in the profits of the business during the chargeable accounting period.

Relief on occurrence of deficiency of profits.

7. Where a deficiency of profits occurs in any chargeable accounting period in any business, the profits of the business chargeable with excess profits tax shall be deemed to be reduced and relief shall be granted in accordance with the following provisions :—

(a) the aggregate amount of the profits so chargeable for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency of profits and the amount of excess profits tax payable in respect thereof shall be deemed to be reduced accordingly and the relief necessary to give effect to the reduction shall be given by repayment or otherwise;

(b) where the amount of the deficiency of profits exceeds the aggregate amount of the profits so chargeable for the previous chargeable accounting periods, the balance of the deficiency of profits shall be applied in reducing any profits so chargeable for the next subsequent chargeable accounting period, and if and so far as it exceeds the amount of those profits, any profits so chargeable for the next subsequent chargeable accounting period and so on.

(a) the aggregate amount of the profits so chargeable for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency of profits and the amount of excess profits tax payable in respect thereof shall be deemed to be reduced accordingly and the relief necessary to give effect to the reduction shall be given by repayment or otherwise;

(b) where the amount of the deficiency of profits exceeds the aggregate amount of the profits so chargeable for the previous chargeable accounting periods, or where there is no previous chargeable accounting period, the balance of the deficiency of profits or the whole of the deficiency, as the case may be, shall be applied in reducing any profits so chargeable for the next subsequent chargeable accounting

(a) the aggregate amount of the profits so chargeable for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency of profits and the amount of excess profits tax payable in respect thereof shall be deemed to be reduced accordingly and the relief necessary to give effect to the reduction shall be given by repayment or otherwise;

(b) where the amount of the deficiency of profits exceeds the aggregate amount of the profits so chargeable for the previous chargeable accounting periods, or where there is no previous chargeable accounting period, the balance of the deficiency of profits or the whole of the deficiency, as the case may be, shall be applied in reducing any profits so chargeable for the next subsequent chargeable accounting period, and if and so

period, and if and so far as it exceeds the amount of those profits, any profits so chargeable for the next subsequent chargeable accounting period and so on.

Successions and amalgamations.

8. (1) As from the date of any change in the person carrying on a business, the business shall, subject to the provisions of this Section, be deemed for the purposes of this Act to have been discontinued, and a new business to have been commenced.

(2) Where the change took place before the 1st day of April, 1939, and consisted in the death or retirement of a partner, or the taking in of a partner, the persons carrying on the business after the change may, by notice given in writing before the prescribed date to the Excess Profits Tax Officer, elect that, for the purposes of the provisions of this Act relating to the computation

far as it exceeds the amount of those profits, any profits so chargeable for the next subsequent chargeable accounting period and so on.

Successions and amalgamations.

8. (1) As from the date of any change in the persons carrying on a business, the business shall, subject to the provisions of this Section, be deemed for all the purposes of this Act except for the purposes of determining the amount of the statutory percentage to have been discontinued, and a new business to have been commenced.

(2) Where the change took place before the 1st day of September, 1939, and consisted in the death or retirement of a partner, or the taking in of a partner, the persons carrying on the business after the change may, by notice given in writing before the prescribed date to the Excess Profits Tax Officer, elect that, for the purposes of the provisions of this Act relating to

of standard profits, the business shall not be deemed to have been discontinued.

(3) A business shall not, for the purposes of the provisions of this Act relating to the computation of standard profits, be deemed to be discontinued by reason of any change occurring on or after the 1st day of April, 1939, in the persons carrying it on, and the standard profits of the business in relation to any chargeable accounting period shall be computed accordingly, and, in particular, in computing the capital employed in the business after the change, no regard shall be had to any consideration given in respect of the transfer of the business or any of the assets thereof on the occasion of the change.

(4) Where, on or after the 1st day of April, 1939, two or more businesses are amalgamated, the resulting business shall be treated for the purposes of this Act relating to the computation of standard profits as if—

the computation of standard profits, the business shall not be deemed to have been discontinued.

(3) A business shall not, for the purposes of the provisions of this Act relating to the computation of standard profits, be deemed to be discontinued by reason of any change occurring on or after the 1st day of September, 1939, in the persons carrying it on, and the standard profits of the business in relation to any chargeable accounting period shall be computed accordingly, and, in particular, in computing the capital employed in the business after the change, no regard shall be had to any consideration given in respect of the transfer of the business or any of the assets thereof on the occasion of the change.

(4) Where, on or after the 1st day of September, 1939, two or more businesses are amalgamated, the resulting business shall be treated for the purposes of the provisions of this Act relating to the computation of standard profits as if—

the computation of standard profits, the business shall not be deemed to have been discontinued.

(3) A business shall not, for the purposes of the provisions of this Act relating to the computation of standard profits, be deemed to be discontinued by reason of any change occurring on or after the 1st day of September, 1939, in the persons carrying it on, and the standard profits of the business in relation to any chargeable accounting period shall be computed accordingly, and, in particular, in computing the capital employed in the business after the change, no regard shall be had to any consideration given in respect of the transfer of the business or any of the assets thereof on the occasion of the change.

(4) Where, on or after the 1st day of September, 1939, two or more businesses are amalgamated, the resulting business shall be treated for the purposes of the provisions of this Act relating to the computation of standard profits as if—

(a) it had been in existence throughout the period during which there were in existence any of the former businesses ;

(b) any profits made or losses incurred or capital employed in any of those former businesses had been made, incurred or employed in the resulting business ; and

(c) any assets of any of those former businesses had become assets of the resulting business when they became assets of the former business ;

and, in particular, in computing the capital employed in the resulting business, no regard shall be had to any consideration given in respect of the transfer of any of those former businesses or any of the assets thereof on the occasion of the amalgamation.

(5) Where, on or after the 1st day of April, 1939, part of a business is transferred as a going concern by the person theretofore carrying it on to

(a) it had been in existence throughout the period during which there were in existence any of the former businesses ;

(b) any profits made or losses incurred or capital employed in any of those former businesses had been made, incurred or employed in the resulting business ; and

(c) any assets of any of those former businesses had become assets of the resulting business when they became assets of the former business ;

and in particular, in computing the capital employed in the resulting business, no regard shall be had to any consideration given in respect of the transfer of any of those former businesses or any of the assets thereof on the occasion of the amalgamation.

(5) Where, on or after the 1st day of September, 1939, part of a business is transferred as a going concern by the person theretofore carrying it on to

(a) it had been in existence throughout the period during which there were in existence any of the former businesses ;

(b) any profits made or losses incurred or capital employed in any of those former businesses had been made, incurred or employed in the resulting business ; and

(c) any assets of any of those former businesses had become assets of the resulting business when they became assets of the former business ;

and, in particular, in computing the capital employed in the resulting business, no regard shall be had to any consideration given in respect of the transfer of any of those former businesses or any of the assets thereof on the occasion of the amalgamation.

(5) Where, on or after the 1st day of September, 1939, part of a business is transferred as a going concern by the person theretofore carrying it on

another person, the part transferred and the part not transferred shall each be deemed for the purpose of the provisions of this Act relating to the computation of standard profits to be a continuation of the original business, and the said provisions, including the provisions of this Section relating to amalgamations, shall apply accordingly, subject to any necessary modifications:

Provided that, for the purposes aforesaid, such apportionments shall be made of the profits made, and losses incurred, and the capital employed, in the original business, and of any assets of this original business as may appear to the Excess Profits Tax Officer, or on appeal in the prescribed time and manner to the Board of Referees, to that Board, to be just.

(6) Notwithstanding anything in the foregoing provisions of this Section, where a business was carried on immediately before the 1st day of April, 1936, and that business, or the main part of that business, was transferred after the said day and before the 1st

another person, the part transferred and the part not transferred shall each be deemed for the purposes of the provisions of this Act relating to the computation of standard profits to be a continuation of the original business, and the said provisions, including the provisions of this Section relating to amalgamations, shall apply accordingly, subject to any necessary modifications:

Provided that, for the purposes aforesaid, such apportionments shall be made of the profits made, and losses incurred, and the capital employed, in the original business, and of any assets of the original business as may appear to the Excess Profits Tax Officer, or on appeal in the prescribed time and manner to the Board or Referees, to that Board, to be just.

(6) Notwithstanding anything in the foregoing provisions of this Section, where a business was carried on immediately before the 1st day of April, 1936, and that business, or the main part of that business, was transferred after the said day and before the 1st

to another person, the part transferred and the part not transferred shall each be deemed for the purposes of the provisions of this Act relating to the computation of standard profits to be a continuation of the original business, and the said provisions, including the provisions of this Section relating to amalgamations, shall apply accordingly, subject to any necessary modifications:

Provided that, for the purposes aforesaid, such apportionments shall be made of the profits made, and losses incurred, and the capital employed, in the original business, and of any assets of the original business as may appear to the Excess Profits Tax Officer, or on appeal in the prescribed time and manner to the Board of Referees, to that Board, to be just.

(6) Notwithstanding anything in the foregoing provisions of this Section, where a business was carried on immediately before the 1st day of April, 1936, and that business, or the main part of that business, was transferred after the said day, and before

day of April, 1939, by the person carrying it on to another person, the Excess Profits Tax Officer, if he is satisfied that the business carried on after the transference was not substantially different from the business or part transferred, may, on the application of the person carrying on the business after the transference, treat that person, for the purposes of the provisions of this Act relating to the computation of standard profits, as if he had carried on the transferred business or part of the business as from the date of the commencement of that business, subject, however, to such modifications (including modifications as respects the computation of capital) as he may consider just.

day of September, 1939, by the person carrying it on to another person, the Excess Profits Tax Officer, if he is satisfied that the business carried on after the transference was not substantially different from the business or part transferred, shall, on the application of the person carrying on the business after the transference, treat that person, for the purposes of the provisions of this Act relating to the computation of standard profits, as if he had carried on the transferred business or part of the business as from the date of the commencement of that business, subject, however, to such modifications (including modifications as respects the computation of capital as he may consider just.

(7) Where, on or after the 1st day of September, 1939, a partner in a firm carrying on a business to which this Act applies dies, then notwithstanding anything contained in sub-section (1) any deficiency of profits in respect of any chargeable accounting period ending on or before the date of

the 1st day of September, 1939, by the person carrying it on to another person, the Excess Profits Tax Officer, if he is satisfied that the business carried on after the transference was not substantially different from the business or part transferred, shall, on the application of the person carrying on the business after the transference, treat that person, for the purposes of the provisions of this Act relating to the computation of standard profits, as if he had carried on the transferred business or part of the business as from the date of the commencement of that business, subject, however, to such modifications (including modifications as respects the computation of capital) as he may consider just.

(7) Where, on or after the 1st day of September, 1939, a partner in a firm carrying on a business to which this Act applies dies, then notwithstanding anything contained in sub-section (1) any deficiency of profits in respect of any chargeable accounting period ending on or before the date of

his death shall, if it has not been fully applied in reducing the profits of any chargeable accounting period under Section 7, be carried forward and applied in reducing any profits from the same business carried on by the surviving partner or partners in the first chargeable accounting period after the death of the partner, and if and so far as it exceeds the amount of those profits, in reducing any profits from such business in the next subsequent chargeable accounting period and so on.

Inter-connected companies.

9. (1) Where any interest, annuity or other annual payment, or any royalty or rent, is paid by one company to another company, and one of those companies is a subsidiary of the other, or both are subsidiaries of a third company, the capital, profits and losses of both companies shall be computed for the purposes of this Act as if—

(a) the interest, annuity, annual payment, royalty or rent were

his death shall, if it has not been fully applied in reducing the profits of any chargeable accounting period under section 7, be carried forward and applied in reducing any profits from the same business carried on by the surviving partner or partners in the first chargeable accounting period after the death of the partner, and if and so far as it exceeds the amount of those profits, in reducing any profits from such business in the next subsequent chargeable accounting period and so on.

Inter-connected companies.

9. (1) Where any interest, annuity or other annual payment, or any royalty or rent, is paid by one company to another company, and one of those companies is a subsidiary of the other, or both are subsidiaries of a third company, the capital, profits and losses of both companies shall be computed for the purposes of this Act as if—

(a) the interest, annuity, annual payment, royalty or rent were

not payable;	not payable;	not payable;
<p>(b) any debt in respect of which any such interest is payable did not exist; and,</p> <p>(c) any asset in respect of which any such royalty or rent is payable were the property of the company paying the royalty or the rent.</p>	<p>(b) any debt in respect of which any such interest is payable did not exist; and</p> <p>(c) any asset in respect of which any such royalty or rent is payable were the property of the company paying the royalty or the rent.</p>	<p>(b) any debt in respect of which any such interest is payable did not exist; and</p> <p>(c) any asset in respect of which any such royalty or rent is payable were the property of the company paying the royalty or the rent.</p>
(2) Where—	(2) Where—	2. Where—
<p>(a) a company (hereinafter referred to as "the principal company") is resident in British India and is not a subsidiary of any other company resident in British India; and</p>	<p>(a) a company (hereinafter referred to as "the principal company") is resident in British India and is not a subsidiary of any other company resident in British India; and</p>	<p>(a) a company (hereinafter referred to as "the principal company") is resident in British India and is not a subsidiary of any other company resident in British India; and</p>
<p>(b) during the whole or any part of any chargeable accounting period of the principal company, another company, whether or not resident or carrying on business within British India (hereinafter referred to as "the subsidiary</p>	<p>(b) during the whole or any part of any chargeable accounting period of the principal company, another company, whether or not resident or carrying on business within British India (hereinafter referred to as "the subsidiary company") is a</p>	<p>(b) during the whole or any part of any chargeable accounting period of the principal company, another company, whether or not resident or carrying on business within British India (hereinafter referred to as "the subsidiary company").</p>

is a subsidiary of the principal company.

the following provisions of this Section shall have effect in relation to that chargeable accounting period.

(3) If the subsidiary company is a subsidiary of the principal company throughout the chargeable accounting period, such capital employed in, and profits or losses arising from, the business of the subsidiary company as is employed or arise in—

(i) the chargeable accounting period; or

(ii) any year constituting or comprised in the standard period of the principal company,

shall be treated for the purposes of this Act as if it or they were capital employed in, or as the case may be, profits or losses arising from, the business of the principal company.

is subsidiary of the principal company,

the following provisions of this Section shall, subject to the provision of Section 5, have effect in relation to that chargeable accounting period.

(3) If the subsidiary company is a subsidiary of the principal company throughout the chargeable accounting period, such capital employed in, and profits or losses arising from, the business of the subsidiary company as is employed or arise in—

(i) the chargeable accounting period; or

(ii) any year constituting or comprised in the standard period of the principal company,

shall be treated for the purposes of this Act as if it or they were capital employed in, or as the case may be, profits or losses arising from, the business of the principal company.

company") is a subsidiary of the principal company,

the following provisions of this Section shall, subject to the provisions of Section 5, have effect in relation to that chargeable accounting period.

(3) If the subsidiary company is a subsidiary of the principal company throughout the chargeable accounting period, such capital employed in, and profits or losses arising from, the business of the subsidiary company as is employed or arise in—

(i) the chargeable accounting period; or

(ii) any year constituting or comprised in the standard period of the principal company,

shall be treated for the purposes of this Act as if it or they were capital employed in, or as the case may be, profits or losses arising from, the business of the principal company.

(4) If the subsidiary company is a subsidiary of the principal company during part only of the chargeable accounting period, the excess or deficiency of profits of the subsidiary company for that part of that period shall be treated as increasing or, as the case may be, decreasing the excess or deficiency of profits of the principal company for the whole period and shall not be deemed to be an excess or deficiency of profits of the subsidiary company.

In this sub-section, the expressions "excess" and "deficiency" mean, in relation to profits, an excess or deficiency in relation to the standard profits of the subsidiary company or, as the case may be, the principal company.

(5) In any case to which sub-section (3) or sub-section (4) of this Section applies, such alteration, if any, of the periods, which would otherwise be the chargeable accounting periods of the subsidiary company shall be made as

(4) If the subsidiary company is a subsidiary of the principal company during part only of the chargeable accounting period, the excess or deficiency of profits of the subsidiary company for that part of that period shall be treated as increasing or, as the case may be, decreasing the excess or deficiency of profits of the principal company for the whole period and shall not be deemed to be an excess or deficiency of profits of the subsidiary company.

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(5) In any case to which sub-section (3) or sub-section (4) applies, such alteration, if any, of the periods, which would otherwise be the chargeable accounting periods of the subsidiary company shall be made as the

the Central Board of Revenue may direct.

(6) For the purposes of this Section, a company shall be deemed to be a subsidiary of another company if and so long as not less than nine-tenths of its ordinary share capital is owned by that other company, whether directly or through another company or other companies, or partly directly and partly through another company or other companies.

(7) The amount of ordinary share capital of one company owned by a second company through another company or other companies, or partly directly and partly through another company or other companies shall be determined in accordance with the provisions of the Third Schedule.

(8) In this Section and the Third Schedule references to ownership shall be construed as references to beneficial ownership, and the expression "ordinary share capital" in relation to a company, means all the issued share

as the Central Board of Revenue may direct.

(6) For the purposes of this Section, a company shall be deemed to be a subsidiary of another company if and so long as not less than nine-tenths of its ordinary share capital is owned by that other company, whether directly or through another company or other companies, or partly directly and partly through another company or other companies.

(7) The amount of ordinary share capital of one company owned by a second company through another company or other companies, or partly directly and partly through another company or other companies shall be determined in accordance with the provisions of the Third Schedule.

(8) In this Section and the Third Schedule references to ownership shall be construed as references to beneficial ownership, and the expression "ordinary share capital", in relation to a company, means all the issued share

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(7) The amount of ordinary share capital of one company owned by a second company through another company or other companies, or partly directly and partly through another company or other companies shall be determined in accordance with the provisions of the Third Schedule.

(8) In this Section and the Third Schedule references to ownership shall be construed as references to beneficial ownership, and the expression "ordinary share capital", in relation to a company, means all the issued

capital (by whatever name called) of the company, other than capital the holders whereof have a right to a dividend at a fixed rate but have no other right to share in the profits of the company.

Artificial transactions.

10. (1) A person shall not for the purpose of reducing any excess profits which are or would be chargeable to excess profits tax enter into a fictitious or artificial transaction, or carry out

capital (by whatever name called) of the company, other than capital the holders whereof have a right to a dividend at a fixed rate but have no other right to share in the profits of the company.

Artificial transactions.

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share capital (by whatever name called) of the company, other than capital the holders whereof have a right to a dividend at a fixed rate but have no other right to share in the profits of the company.

(9) The principal company shall be entitled to allocate to its subsidiary company or companies the respective proportionate shares of the excess profits tax payable by the whole group.

(10) The excess profits tax payable by virtue of this Section by the principal company in respect of the profits of any subsidiary company shall, for the purposes of Section 12, be deemed to have been paid by the subsidiary company and not by the principal company.

Artificial transactions.

10. (1) A person shall not for the purpose of reducing any excess profits which are or would be chargeable to excess profits tax enter into a fictitious or artificial transaction, or carry out

any fictitious or artificial operation.

Explanation.—For the purposes of this Section an artificial transaction or operation includes every device of whatever nature adopted for the purpose of presenting the accounts of a business in a misleading form or manner with intent or having the effect of evading any obligation imposed by this Act.

(3) Any such transaction or operation shall be treated as null and void for the purpose of computing the excess profits tax payable under this Act.

(3) If the Excess Profits Tax Officer is satisfied that any person has acted in contravention of the provisions of sub-section (1), he may with the previous approval of the Inspecting Assistant Commissioner direct that such person shall pay, in addition to any excess profits tax for which he is or would, but for such transaction or operation, be liable, a penalty not exceeding the tax evaded or sought to be evaded.

any fictitious or artificial operation.

Explanation.—For the purposes of this Section an artificial transaction or operation includes every device of whatever nature adopted for the purpose of presenting the accounts of a business in a misleading form or manner with intent to evade or having the effect of evading any obligation imposed by this Act.

(2) Any such transaction or operation shall be treated as null and void for the purpose of computing the excess profits tax payable under this Act.

(3) If the Excess Profits Tax Officer is satisfied that any person has acted in contravention of the provisions of sub-section (1), he may with the previous approval of the Inspecting Assistant Commissioner direct that such person shall pay, in addition to any excess profits tax for which he is or would, but for such transaction or operation, be liable, a penalty not exceeding the tax evaded or sought to

any fictitious or artificial operation.

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(3) If the Excess Profits Tax Officer is satisfied that any person has acted in contravention of the provisions of sub-section (1), he may, with the previous approval of the Inspecting Assistant Commissioner direct that such person shall pay, in addition to any excess profits tax for which he is or would, but for such transaction or operation, be liable, a penalty not exceeding the tax evaded or sought to

be evaded.

Relief in respect of double excess profits taxation.

11. (1) The Central Government may, by notification in the official Gazette, make provision for the granting of relief in cases where both excess profits tax under this Act and excess profits tax under any law in force in the United Kingdom, in any Indian State, or in any other part of His Majesty's Dominions, have been paid upon the profits of any business if it appears to the Central Government that the laws of the United Kingdom or of that Indian State or of that other part of His Majesty's Dominions provide for corresponding relief in respect of excess profits tax charged on profits both in the United Kingdom or in that State or in that part and in British India :

Provided that where under Section 19 of the Finance (No. 2) Act, 1939, national defence contribution has been paid in the United Kingdom in lieu

be evaded.

Relief in respect of double excess profits taxation.

11. (1) The Central Government may by notification in the official Gazette make provision for the granting of relief in cases where both excess profits tax under this Act and excess profits tax under any law in force in the United Kingdom, in any Indian State, or in any other part of His Majesty's Dominions have been paid upon the profits of any business if it appears to the Central Government that the laws of the United Kingdom or of that Indian State or of that other part of His Majesty's Dominions provide for corresponding relief in respect of excess profits tax charged on profits both in the United Kingdom or in that State or in that part and in British India :

Provided that where under Section 19 of the Finance (No. 2) Act, 1939, national defence contribution has been paid in the United Kingdom in lieu of

Relief in respect of double excess Profits taxation.

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excess profits tax, that portion of the national defence contribution so paid which is equal to the excess profits tax which would otherwise have been payable shall, for the purposes of this sub-section, be deemed to be excess profits tax paid in the United Kingdom.

(2) If any person, who has paid excess profits tax under this Act for any chargeable accounting period in respect of profits arising outside India in a country the laws of which do not provide for any relief in respect of excess profits tax charged in British India, proves that he has paid excess profits tax under the laws of the said country in respect of the same profits, he shall be entitled to the deduction from the excess profits tax payable in British India of a sum equal to one-half thereof or to one-half of the excess profits tax payable in the said country, whichever is the less.

Allowance of excess profits tax in computing income for income-tax purposes.

12. (1) The amount of the excess

of excess profits tax, that portion of the national defence contribution so paid which is equal to the excess profits tax which would otherwise have been payable shall, for the purposes of this sub-section, be deemed to be excess profits tax paid in the United Kingdom.

(2) If any person, who has paid excess profits tax under this Act for any chargeable accounting period in respect of profits arising outside India in a country the laws of which do not provide for any relief in respect of excess profits tax charged in British India, proves that he has paid excess profits tax under the laws of the said country in respect of the same profits, he shall be entitled to the deduction from the excess profits tax payable in British India of a sum equal to one-half thereof or to one-half of the excess profits tax payable in the said country whichever is the less.

Allowance of excess profits tax in computing income for income-tax purposes.

12. (1) The amount of the excess

profits tax payable in respect of a business for any chargeable accounting period diminished by an amount allowed by way of relief under the provisions of Section 11, shall, in computing for the purposes of income-tax the profits and gains of that business, be allowed to be deducted as an expense incurred in that period.

(2) There shall also be so deducted the amount of any excess profits tax payable under any law in force in the United Kingdom, in any Indian State or in any other part of His Majesty's Dominions on the profits of the business in respect of any chargeable accounting period to the extent that such profits arose in the United Kingdom or the Indian State or the other part of His Majesty's Dominions in question respectively, after diminishing such amount by any amount which has been allowed by way of relief by repayment, set off or otherwise under any law in the country where the tax is payable providing for the granting of relief in that country where excess

profits tax payable in respect of a business for any chargeable accounting period diminished by any amount allowable by way of relief under the provisions of Section 11, shall, in computing for the purposes of income-tax or super-tax the profits and gains of that business, be allowed to be deducted as an expense incurred in that period.

(2) There shall also be so deducted the amount of any excess profits tax payable under any law in force in the United Kingdom, in any Indian State or in any other part of His Majesty's Dominions on the profits of the business in respect of any chargeable accounting period to the extent that such profits arose in the United Kingdom or the Indian State or the other part of His Majesty's Dominions in question respectively, after diminishing such amount by any amount which is allowable by way of relief by repayment, set off or otherwise under any law in the country where the tax is payable providing for the granting of relief in that country where excess

profits tax payable in respect of a business for any chargeable accounting period diminished by any amount allowable by way of relief under the provisions of Section 11, shall, in computing for the purposes of income-tax or super-tax the profits and gains of that business, be allowed to be deducted as an expense incurred in that period.

(2) There shall also be so deducted the amount of any excess profits tax payable under any law in force in a country outside British India on the profits of the business in respect of any chargeable accounting period to the extent that such profits arose in the said country, after diminishing such amount by any amount which is allowable by way of relief by repayment, set off or otherwise under any law in the country where the tax is payable providing for the granting of relief in that country where excess profits tax has also been charged in British India:

profits tax has also been charged in British India:

Provided that where, under the provisions of this Act relating to deficiencies of profits or under any corresponding law in force in the United Kingdom, or in any Indian State or in any other part of His Majesty's Dominions, relief is given by way of repayment from excess profits tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed under sub-section (1) or sub-section (2) of this Section shall not be altered but the amount repayable shall be taken into account in computing the profits and gains of the business for the purposes of income-tax as if it were a profit of the business accruing in the chargeable accounting period in which the deficiency of profits occurs.

Issue of notices for assessment.

13. (1) The Excess Profits Tax Officer may, for the purposes of this Act,

profits tax has also been charged in British India:

Provided that where, under the provisions of this Act relating to deficiencies of profits or under any corresponding law in force in the United Kingdom, or in any Indian State or in any other part of His Majesty's Dominions, relief is given by way of repayment from excess profits tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed under sub-section (1) or sub-section (2) * * * shall not be altered but the amount repayable shall be taken into account in computing the profits and gains of the business for the purposes of income-tax as if it were a profit of the business for accruing in the chargeable accounting period in which the deficiency of profits occurs.

Issue of notices for assessment.

13. (1) The Excess Profits Tax Officer may, for the purposes of this Act,

Provided that where, under the provisions of this Act relating to deficiencies of profits or under any corresponding law in force in the said country without British India, relief is given by way of repayment from excess profits tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed under sub-section (1) or sub-section (2) shall not be altered, but the amount repayable shall be taken into account in computing the profits and gains of the business for the purposes of income-tax as if it were a profit of the business accruing in the chargeable accounting period in which the deficiency of profits occurs.

Issue of notices for assessment.

13. (1) The Excess Profits Tax Officer may, for the purposes of this Act,

require any person whom he believes to be engaged in any business to which this Act applies, or to have been so engaged during any chargeable accounting period, or to be otherwise liable to pay excess profits tax, to furnish within such period, not being less than thirty days, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) with respect to any chargeable accounting period specified in the notice the profits of the business and the standard profits of the business as computed in accordance with the provisions of Section 6 or the amount of deficiency available for relief under Section 7:

• Provided that the Excess Profits Tax Officer may, in his discretion, extend the date for the delivery of the return.

(2) The Excess Profits Tax Officer may serve on any person, upon whom

require any person whom he believes to be engaged in any business to which this Act applies, or to have been so engaged during any chargeable accounting period, or to be otherwise liable to pay excess profits tax, to furnish within such period, not being less than sixty days from the date of the service of the notice, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) with respect to any chargeable accounting period specified in the notice the profits of the business and the standard profits of the business as computed in accordance with the provisions of Section 6 or the amount of deficiency available for relief under Section 7:

Provided that the Excess Profits Tax Officer may, in his discretion, extend the date for the delivery of the return.

(2) The Excess Profits Tax Officer may serve on any person, upon whom

require any person whom he believes to be engaged in any business to which this Act applies, or to have been so engaged during any chargeable accounting period, or to be otherwise liable to pay excess profits tax, to furnish within such period, not being less than sixty days from the date of the service of the notice, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) with respect to any chargeable accounting period specified in the notice the profits of the business and the standard profits of the business as computed in accordance with the provisions of Section 6 or the amount of deficiency available for relief under Section 7:

Provided that the Excess Profits Tax Officer may, in his discretion, extend the date for the delivery of the return.

(2) The Excess Profits Tax Officer may serve on any person, upon whom

a notice has been served under subsection (1), a notice requiring him on a date to be therein specified to produce, or cause to be produced, such accounts or documents as the Excess Profits Tax Officer may require and may, from time to time, serve further notices in like manner requiring the production of such further accounts or documents or other evidence as he may require.

Assessments.

14. (1) The Excess Profits Tax Officer shall, by an order in writing after considering such evidence, if any, as he has required under Section 13, assess to the best of his judgment the profits liable to excess profits tax and the

a notice has been served under subsection (1), a notice requiring him on a date to be therein specified to produce, or cause to be produced, such accounts or documents as the Excess Profits Tax Officer may require and may, from time to time serve further, notices in like manner requiring the production of such further accounts or documents or other evidence as he may require.

Assessments.

14. (1) The Excess Profits Tax Officer shall, by an order in writing after considering such evidence, if any, as he has required under Section 13, assess to the best of his judgment the profits liable to excess profits tax and the

a notice has been served under subsection (1), a notice requiring him on a date to be therein specified to produce, or cause to be produced, such accounts or documents as the Excess Profits Tax Officer may require and may, from time to time, serve further notices in like manner requiring the production of such further accounts or documents or other evidence as he may require:

Provided that the Excess Profits Tax Officer shall not require the production of any accounts relating to a period prior to the "previous year" as determined under Section 2 of the Indian Income-tax Act, 1922, for the purpose of the income-tax assessment for the year ending on the 31st day of March, 1937.

Assessments.

14. (1) The Excess Profits Tax Officer shall, by an order in writing after considering such evidence, if any, as he has required under Section 13, assess to the best of his judgment the profits liable to excess profits tax and the

• amount of excess profits tax payable on the basis of such assessment, or if there is a deficiency of profits amount of that deficiency and the amount of excess profits tax, if any, repayable.

(2) Excess profits tax payable in respect of any chargeable accounting period shall be payable by the person carrying on the business in that period.

(3) Where two or more persons were carrying on the business jointly in the chargeable accounting period, the assessment shall be made upon them jointly and, in the case of a partnership, may be made in the partnership name.

(4) Where by virtue of the foregoing provisions an assessment could, but for his death, have been made or any person either solely or jointly with any other person or persons, the assessment may be made on his personal representative either solely or jointly with that

amount of excess profits tax payable on the basis of such assessment, or if there is a deficiency of profits, the amount of that deficiency and the amount of excess profits tax, if any, repayable and shall furnish a copy of such order to the person on whom the assessment has been made.

(2) Excess profits tax payable in respect of any chargeable accounting period shall be payable by the person carrying on the business in that period.

(3) Where two or more persons were carrying on the business jointly in the chargeable accounting period, the assessment shall be made upon them jointly and, in the case of a partnership, may be made in the partnership name.

(4) Where by virtue of the foregoing provisions an assessment could, but for his death, have been made on any person either solely or jointly with any other person or persons, the assessment may be made on his legal representative either solely or jointly

amount of excess profits tax payable on the basis of such assessment, or if there is a deficiency of profits, the amount of that deficiency and the amount of excess profits tax, if any, repayable and shall furnish a copy of such order to the person on whom the assessment has been made.

(2) Excess profits tax payable in respect of any chargeable accounting period shall be payable by the person carrying on the business in that period.

(3) Where two or more persons were carrying on the business jointly in the chargeable accounting period, the assessment shall be made upon them jointly and, in the case of a partnership, may be made in the partnership name.

(4) Where by virtue of the foregoing provisions an assessment could, but for his death, have been made on any person either solely or jointly with any other person or persons, the assessment may be made on his legal representative either solely or jointly

other person or persons, as the case may be.

Profits escaping assessment.

15. If, in consequence of definite information which has come into his possession, the Excess Profits Tax Officer discovers that profits of any chargeable accounting period chargeable to excess profits tax have hitherto escaped assessment, or have been under-assessed, or have been the subject of excessive relief, he may at any time within five years of the end of the chargeable accounting period in question serve on the person liable to such tax a notice containing all or any of the requirements which may be included in a notice under Section 13, and may proceed to assess or re-assess the amount of such profits liable to excess profits tax and the provisions of this Act shall, so far as may be, apply as if the notice were a notice issued under that Section.

Penalties.

16. If the Excess Profits Tax Officer,

with that other person or persons, as the case may be.

Profits escaping assessment.

15. If, in consequence of definite information which has come into his possession, the Excess Profits Tax Officer discovers that profits of any chargeable accounting period chargeable to excess profits tax have escaped assessment, or have been under-assessed, or have been the subject of excessive relief, he may at any time within five years of the end of the chargeable accounting period in question serve on the person liable to such tax a notice containing all or any of the requirements which may be included in a notice under Section 13, and may proceed to assess or re-assess the amount of such profits liable to excess profits tax and the provisions of this Act shall, so far as may be, apply as if the notice were a notice issued under that Section.

Penalties.

16. If the Excess Profits Tax Officer,

with that other person or persons, as the case may be.

Profits escaping assessment.

15. If, in consequence of definite information which has come into his possession, the Excess Profits Tax Officer discovers that profits of any chargeable accounting period chargeable to excess profits tax have escaped assessment, or have been under-assessed, or have been the subject of excessive relief, he may at any time within five years of the end of the chargeable accounting period in question serve on the person liable to such tax a notice containing all or any of the requirements which may be included in a notice under Section 13, and may proceed to assess or re-assess the amount of such profits liable to excess profits tax and the provisions of this Act shall, so far as may be, apply as if the notice were a notice issued under that Section.

Penalties.

16. If the Excess Profits Tax Officer,

the Appellate Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act, is satisfied that any person has, without reasonable cause, failed to furnish the return required by sub-section (1) of Section 13, or to produce or cause to be produced the accounts or documents or other evidence required by the Excess Profits Tax Officer under sub-section (2) of that Section, or has concealed particulars of the profits made by (or capital employed in the business) or has deliberately furnished inaccurate particulars of such profits or capital, he may direct that such person shall pay by way of penalty, in addition to the amount of any excess profits tax payable, a sum not exceeding—

- (a) where the person has failed to furnish the return required under sub-section (1) of Section 13, the amount of the excess profits tax payable; and
- (b) in any other case the amount of excess profits tax which

the Appellate Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act, is satisfied that any person has, without reasonable cause, failed to furnish the return required under sub-section (1) of Section 13, or to produce or cause to be produced the accounts or documents or other evidence required by the Excess Profits Tax Officer under sub-section (2) of that Section, or has concealed particulars of the profits made by or capital employed in the business, or has deliberately furnished inaccurate particulars of such profits or capital, he may direct that such person shall pay by way of penalty, in addition to the amount of any excess profits tax payable, sum not exceeding—

- (a) where the person has failed to furnish the return required under sub-section (1) of Section 13, the amount of the excess profits tax payable; and
- (b) in any other case, the amount of excess profits tax which

the Appellate Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act, is satisfied that any person has, without reasonable cause, failed to furnish the return required under sub-section (1) of Section 13, or to produce or cause to be produced the accounts or documents or other evidence required by the Excess Profits Tax Officer under sub-section (2) of that Section, or has concealed particulars of the profits made by or capital employed in the business, or has deliberately furnished inaccurate particulars of such profits or capital, he may direct that such person shall pay by way of penalty, in addition to the amount of any excess profits tax payable, a sum not exceeding—

- (a) where the person has failed to furnish the return required under sub-section (1) of Section 13, the amount of the excess profits tax payable; and
- (b) in any other case, the amount of excess profits tax which

would have been avoided if the return made had been accepted as correct :

Provided that the Excess Profits Tax Officer shall not impose any penalty under this Section without the previous approval of the Inspecting Assistant Commissioner.

would have been avoided if the return made had been accepted as correct :

Provided that the Excess Profits Tax Officer shall not impose any penalty under this Section without the previous approval of the Inspecting Assistant Commissioner.

(2) No prosecution for an offence against this Act shall be instituted in respect of the same facts as those in respect of which a penalty has been imposed under this Section.

Appeals.

17. (1) Any person objecting to the amount of excess profits tax for which he is liable as assessed by the Excess Profits Tax Officer or denying his liability to be assessed under this Act, or objecting to any penalty imposed by the Excess Profits Tax Officer, or to the amount of any deficiency of profits as assessed by the Excess Profits Tax Officer, or to the amount allowed by the Excess Profits Tax Officer by way of relief under any provision of

Appeals.

17. (1) Any person aggrieved by a decision made in pursuance of Section 8, or objecting to the amount of excess profits tax for which he is liable as assessed by the Excess Profits Tax Officer or denying his liability to be assessed under this Act, or objecting to any penalty imposed by the Excess Profits Tax Officer, or to the amount of any deficiency of profits as assessed by the Excess

would have been avoided if the return made had been accepted as correct :

Provided that the Excess Profits Tax Officer shall not impose any penalty under this Section without the previous approval of the Inspecting Assistant Commissioner.

Appeals.

17. (1) Any person aggrieved by a decision made in pursuance of Section 8, or objecting to the amount of excess profits tax for which he is liable as assessed by the Excess Profits Tax Officer or denying his liability to be assessed under this Act, or objecting to any penalty imposed by the Excess Profits Tax Officer, or to the amount of any deficiency of profits as assessed by the Excess Profits Tax Officer, or

this Act or to any refusal by the Excess Profits Tax Officer to grant relief may appeal to the Appellate Assistant Commissioner :

Provided that no appeal shall lie against a determination of the amount of the profits of any standard period where those profits have been determined in accordance with the first proviso of rule 1 of the First Schedule except in respect of adjustments made under the provisions of that Schedule :

Provided further that no appeal shall lie under this Section against any apportionment made by the Excess Profits Tax Officer under the proviso to sub-section (6) of Section 8 or against any decision of the Board of Referees under sub-section (3) of Section 6 ;

(2) An appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating to the

Profits Tax Officer, or to the amount allowed by the Excess Profits Tax Officer by way of relief under any provision of this Act or to any refusal by the Excess Profits Tax Officer to grant relief may appeal to the Appellate Assistant Commissioner :

Provided that no appeal shall lie against a determination of the amount of the profits of any standard period where those profits have been determined in accordance with the first proviso to rule 1 of the First Schedule except in respect of adjustments made under the provisions of that Schedule :

Provided further that no appeal shall lie under this Section against any apportionment made by the Excess Profits Tax Officer under the proviso to sub-section (5) of Section 8 or against any decision of the Board of Referees under sub-section (3) of Section 6.

(2) An appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating

to the amount allowed by the Excess Profits Tax Officer by way of relief under any provision of this Act or to any refusal by the Excess Profits Tax Officer to grant relief may appeal to the Appellate Assistant Commissioner :

Provided that no appeal shall lie against a determination of the amount of the profits of any standard period where those profits have been determined in accordance with the first proviso to rule 1 of the First Schedule except in respect of adjustments made under the provisions of that Schedule :

Provided further that no appeal shall lie under this Section against any apportionment made by the Excess Profits Tax Officer under the proviso to sub-section (5) of Section 8 or against any decision of the Board of Referees under sub-section (3) of Section 6.

(2) An appeal shall ordinarily be presented within forty-five days of receipt of demand relating to the assess-

assessment or penalty objected to, or in the case of an appeal against the assessment of a deficiency of profits, within thirty days of the receipt of the copy of the order determining the deficiency, or in the case of an appeal against the amount of a relief granted or a refusal to grant relief, within thirty days of the receipt of the intimation of the order granting or refusing to grant the relief, but the Appellate Assistant Commissioner may admit an appeal after the expiration of that period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

(3) An appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(4) The Appellate Assistant Commissioner shall hear and determine the appeal and, subject to the provisions of this Act, shall pass such orders as he thinks fit and such orders may include an order enhancing the assessment.

to the assessment or penalty objected to, or in the case of an appeal against the assessment of a deficiency of profits, within forty-five days of the receipt of the copy of the order determining the deficiency, or in the case of an appeal against the amount of a relief granted or a refusal to grant relief, within forty-five days of the receipt of the intimation of the order granting or refusing to grant the relief, but the Appellate Assistant Commissioner may admit an appeal after the expiration of that period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

(3) An appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(4) The Appellate Assistant Commissioner shall hear and determine the appeal and, subject to the provisions of this Act, shall pass such orders as he thinks fit, and such orders may include an order enhancing the assessment or a penalty:

ment or penalty objected to, or in the case of an appeal against the assessment of a deficiency of profits, within forty-five days of receipt of the copy of the order determining the deficiency, or in the case of an appeal against the amount of a relief granted or a refusal to grant relief, within forty-five days of the receipt of intimation of the order granting or refusing to grant the relief, but the Appellate Assistant Commissioner may admit an appeal after the expiration of that period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

(3) An appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(4) The Appellate Assistant Commissioner shall hear and determine the appeal and, subject to the provisions of this Act, shall pass such orders as he thinks fit, and such orders may include an order enhancing the assessment or a penalty:

Provided that an order enhancing an assessment or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) The procedure to be adopted in the hearing and determination of appeals shall be in accordance with the regulations made in this behalf by the Central Board of Revenue.

(5) The procedure to be adopted in the hearing and determination of appeals shall be in accordance with the rules made in this behalf by the Central Board of Revenue.

Appeal to Commissioner against Appellate Assistant Commissioner's orders, imposing penalties or enhancing assessments or penalties.

Appeal to Commissioner against Appellate Assistant Commissioner's orders, imposing penalties or enhancing assessments or penalties.

18. (1) Any person objecting to an order passed by an Appellate Assistant Commissioner imposing on him a penalty under Section 16 or enhancing his assessment or enhancing a penalty under Section 17 may appeal to the Commissioner within thirty days of the date on which he was served with notice of such order.

18. (1) Any person objecting to an order passed by an Appellate Assistant Commissioner imposing on him a penalty under Section 16 or enhancing a penalty under Section 17 may appeal to the Commissioner within thirty days of the date on which he was served with notice of such order.

(2) In disposing of the appeal the Commissioner may, after giving the appellant an opportunity of being heard pass, such orders thereon as he thinks fit.

(3) On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, this Section shall cease to have effect.

Power of revision.

19. (1) The Commissioner may of his own motion ; call for the record of any proceeding under this Act which has been taken by any Excess Profits Tax Officer or Appellate Assistant Commissioner subordinate to him, and on receipt of the record may make such enquiry, or cause such enquiry to be made, and, subject to the provisions of this Act, may pass such orders thereon (including an order enhancing an assessment) as he thinks fit :

Provided that he shall not pass any order prejudicial to a person to

(2) In disposing of the appeal the Commissioner may, after giving the appellant an opportunity of being heard, pass such orders thereon as he thinks fit.

(3) On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, this Section shall cease to have effect.

Power of revision.

19. (1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any Excess Profits Tax Officer or Appellate Assistant Commissioner subordinate to him, and on receipt of the record may make such enquiry, or cause such enquiry to be made, and, subject to the provisions of this Act, may pass such orders thereon (including an order enhancing an assessment) as he thinks fit :

Provided that he shall not pass any order prejudicial to a person to

Power of revision.

18. (1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any Excess Profits Tax Officer or Appellate Assistant Commissioner subordinate to him, and on receipt of the record may make such enquiry, or cause such enquiry, or cause such enquiry to be made, and, subject to the provisions of this Act, may pass such orders thereon (including an order enhancing an assessment) as he thinks fit :

Provided that he shall not pass any order prejudicial to a person to

whose business this Act applies without hearing him, or giving him a reasonable opportunity of being heard.

(2) On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, sub-section (1) shall cease to have effect, but thereafter any person made liable under this Act for the payment of excess profits tax, or any Excess Profits Tax Officer who objects to an order passed by an Appellate Assistant Commissioner may, within the prescribed time and in the prescribed manner appeal against such order to the Appellate Tribunal constituted under the Indian Income-tax Act, 1922, and that Tribunal shall have all such powers in disposing of the appeal as it has in respect of appeals preferred to it under the Indian Income-tax Act, 1922.

Rectification of mistake.

19. The Commissioner may, at any time within four years from the date

whose business this Act applies without hearing him, or giving him a reasonable opportunity of being heard.

(2) On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, sub-section (1) shall cease to have effect, but thereafter any person made liable under this Act for the payment of excess profits tax, or any Excess Profits Tax Officer who objects to an order passed by an Appellate Assistant Commissioner may, within the prescribed time and in the prescribed manner appeal against such order to the Appellate Tribunal constituted under the Indian Income-tax Act, 1922, and that Tribunal shall have all such powers in disposing of the appeal as it has in respect of appeals preferred to it under the Indian Income-tax Act, 1922.

Rectification of mistake.

20. The Commissioner may, at any time within four years from the date

whose business this Act applies without hearing him, or giving him a reasonable opportunity of being heard.

(2) On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, sub-section (1) shall cease to have effect, but thereafter any Excess Profits Tax Officer or any person in respect of whose business an order under Section 14 has been passed who objects to an order passed by an Appellate Assistant Commissioner under Section 16 or Section 17 may, within the prescribed time and in the prescribed manner, appeal against such order to the Appellate Tribunal constituted under the Indian Income-tax Act, 1922, and that Tribunal shall have all such powers in disposing of the appeal as it has in respect of appeals preferred to it under the Indian Income-tax Act, 1922.

Rectification of mistake.

20. The Commissioner may, at any time within four days from the date of

of any order passed whether by himself or by any Appellate Assistant Commissioner or Excess Profits Tax Officer under this Act, rectify any mistake apparent from the record, and shall within the like period rectify any such mistake which has been brought to his notice by a person to whose business this Act applies :

Provided that no such rectification shall be made having the effect of enhancing the liability of any person unless that person has been given a reasonable opportunity of being heard.

Application of provisions of Act XI of 1922.

20. The provisions of Sections 4A, 4B, 10, 13, 24B, 29, 36 to 44C (inclusive), 45 to 48 (inclusive) 49E, 49F, 50, 54, 61 to 63 (inclusive), 65 to 67A (inclusive) of the Indian Income-tax Act, 1922, shall apply with such modi-

of any order passed, whether by himself or by any Appellate Assistant Commissioner or Excess Profits Tax Officer under this Act, rectify any mistake in any evidence recorded during assessment or appellate proceedings, or any mistake apparent from the record and shall within the like period rectify any* mistake apparent from the record which has been brought to his notice by a person to whose business this Act applies :

Provided that no such rectification shall be made having the effect of enhancing the liability of any person unless that person has been given a reasonable opportunity of being heard.

Application of provisions of Act XI of 1922.

21. The provisions of Sections 4A, 4B, 10, 13, 24B, 29, 36, 44C (inclusive), 45 to 48 (inclusive), 49E, 49F, 50, 54, 61 to 63 (inclusive), 65 to 67A (inclusive) of the Indian Income-tax Act, 1922, shall apply with such modifications, if

any order passed whether by himself or by any Appellate Assistant Commissioner or Excess Profits Tax Officer under this Act, rectify any mistake in any evidence recorded during assessment or appellate proceedings, or any mistake apparent from the record and shall within the like period rectify any mistake apparent from the record which has been brought to his notice by a person to whose business this Act applies :

Provided that no such rectification shall be made having the effect of enhancing the liability of any person unless that person has been given a reasonable opportunity of being heard.

Application of provisions of Act XI of 1922.

21. The provisions of Sections 4A, 4B, 10, 13, 24B, 29, 36 to 44C (inclusive), 45 to 48 (inclusive), 49E, 49F, 50, 54, 61 to 63 (inclusive), 65 to 67A (inclusive) of the Indian Income-tax Act, 1922 shall apply with

visions, if any, as may be prescribed, as if the said provisions were provisions of this Act and referred to excess profits tax instead of to income-tax, and every officer exercising powers under the said provisions in regard to income-tax may exercise the like powers under this Act in regard to excess profits tax in respect of cases assigned to him under sub-section (3) of Section 3 as he exercises in relation to income-tax under the said Act :

Provided that reference in the said provisions to the assessee shall be construed as references to a person to whose business this Act applies.

Income-tax papers to be available for the purposes of this Act.

21. (1) Notwithstanding anything contained in the Indian Income-tax Act, 1922, all information contained in any statement or return made or furnished under the provisions of that Act or obtained or collected for the purposes

any, as may be prescribed, as if the said provisions were provisions of this Act and referred to excess profits tax instead of to income-tax, and every officer exercising powers under the said provisions in regard to income-tax may exercise the like powers under this Act in regard to excess profits tax in respect of cases assigned to him under sub-section (3) of Section 3 as he exercises in relation to income-tax under the said Act :

Provided that references in the said provisions to the assessee shall be construed as references to a person to whose business this Act applies.

Income-tax papers to be available for the purposes of this Act.

22. (1) Notwithstanding anything contained in the Indian Income-tax Act, 1922, all information contained in any statement or return made or furnished under the provisions of that Act or obtained or collected for the

such modification, if any, as may be prescribed, as if the said provisions were provisions of this Act and referred to excess profits tax instead of to income-tax, and every officer exercising powers under the said provisions in regard to income-tax may exercise the like powers under this Act in regard to excess profits tax in respect of cases assigned to him under sub-section (3) of Section 3 as he exercises in relation to income-tax under the said Act :

Provided that references in the said provisions to the assessee shall be construed as references to a person to whose business this Act applies.

Income-tax papers to be available for the purposes of this Act.

22. (1) Notwithstanding anything contained in the Indian Income-tax Act, 1922, all information contained in any statement or return made or furnished under the provisions of that Act or obtained or collected for the

of that Act may be used for the purposes of this Act.

(3) All information contained in any statement or return made or furnished under the provisions of this Act or obtained or collected for the purposes of this Act may be used for the purposes of the Indian Income-tax Act, 1922.

Failure to deliver returns or statements.

22. If any person fails, without reasonable cause or excuse, to furnish in due time any return or statement, or to produce or cause to be produced, any accounts or documents required to be produced under Section 13, he shall on conviction by a Magistrate be punishable with fine which may extend to five hundred rupees, and with a further fine which may extend to fifty rupees for every day during which the default continues.

False statement and declaration.

23. If a person makes in any return

purposes of that Act may be used for the purposes of this Act.

(2) All information contained in any statement or return made or furnished under the provisions of this Act or obtained or collected for the purposes of this Act may be used for the purposes of the Indian Income-tax Act, 1922.

Failure to deliver returns or statements.

23. If any person fails, without reasonable cause or excuse to furnish in due time any return or statement, or to produce or cause to be produced, any accounts or documents required to be produced, under Section 13, he shall on conviction by a Magistrate be punishable with fine which may extend to five hundred rupees, and with a further fine which may extend to fifty rupees for every day during which the default continues.

False statement and declaration.

24. If a person makes in any return

purposes of that Act may be used for the purposes of this Act.

(2) All information contained in any statement or return made or furnished under the provisions of this Act or obtained or collected for the purposes of this Act may be used for the purposes of the Indian Income-tax Act, 1922.

Failure to deliver returns or statements.

23. If any person fails, without reasonable cause, or excuse, to furnish in due time any return or statement, or to produce, or cause to be produced, any accounts or documents required to be produced under Section 13, he shall on conviction by a Magistrate be punishable with fine which may extend to five hundred rupees, and with a further fine which may extend to fifty rupees for every day during which the default continues.

False statement and declaration.

24. If a person makes in any return

required under Section 13 any statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable on conviction by a Magistrate with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Institution of proceedings and composition of offences.

24. (1) A person shall not be proceeded against for an offence under Section 22 or Section 23 except at the instance of the Inspecting Assistant Commissioner.

(2) The Inspecting Assistant Commissioner may, either before or after

required under Section 13 any statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable on conviction by a Magistrate with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Institution of proceedings and composition of offences.

25. (1) A person shall not be proceeded against for an offence under Section 23 or Section 24 except at the instance of the Inspecting Assistant Commissioner.

(2) The Inspecting Assistant Commissioner may, either before or after

required under Section 13 any statement which is false, and which he either knows or believes to be true, he shall be punishable on conviction by a Magistrate with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Institution of proceedings and composition of offences.

25. (1) A person shall not be proceeded against for an offence under Section 23 or Section 24 except at the instance of the Inspecting Assistant Commissioner.

(2) No prosecution for an offence punishable under Section 23 or Section 24 or under the Indian Penal Code shall be instituted in respect of the same facts as those in respect of which a penalty has been imposed under this Act.

(3) The Inspecting Assistant Commissioner may, either before or after

the institution of proceedings, compound any offence punishable under Section 23 or Section 23.

Power of Central Board of Revenue to grant relief in special cases.

23. If the Central Board of Revenue is satisfied in the case of any business which was in existence before the 31st day of March, 1936, that special circumstances exist which render it inequitable that the standard profits of the business in relation to any chargeable accounting period should be computed in accordance with the provisions of clause (a) of sub-section (1) of Section 6, and no relief has been granted under the provisions of sub-section 3 of that Section, the Central Board of Revenue may direct that the standard profits of the business shall be computed as if the profits during the standard period were such greater amount as the Central Board of Revenue thinks just :

Provided that such greater amount shall not exceed—

the institution of proceedings, compound any offence punishable under Section 23 or Section 24.

Power of Central Board of Revenue to grant relief in special cases.

26. (1) If the Central Board of Revenue is satisfied in the case of any business . . . that special circumstances exist which render it inequitable that the standard profits of the business in relation to any chargeable accounting period should be computed in accordance with the provisions of . . . sub-section (1) of Section 6, and that no relief or insufficient relief has been granted under the provisions of sub-section (3) of that Section, the Central Board of Revenue may direct that the standard profits of the business shall be computed to be such greater amount as the Central Board of Revenue thinks just :

Provided that such . . . amount shall not exceed the statutory percentage

the institution of proceedings, compound any offence punishable under Section 23 or Section 24.

Power of Central Board of Revenue to grant relief in special cases.

26. (1) If the Central Board of Revenue is satisfied in the case of any business that special circumstances exist which render it inequitable that the standard profits of the business in relation to any chargeable accounting period should be computed in accordance with the provisions of sub-section (1) of Section 6, and that no relief or insufficient relief has been granted under the provisions of sub-section (3) of that Section, the Central Board of Revenue may direct that the standard profits of the business shall be computed to be such greater amount as the Central Board of Revenue thinks just :

Provided that such amount shall not exceed the statutory percentage

(a) where the person carrying on the business is a company, the amount sufficient to provide dividends for the standard period—

(i) on the paid up ordinary share capital of the company, at the rate of six per cent per annum,

(ii) on any other paid up share capital of the company, at the fixed rate per annum payable thereon,

(b) in any other case, eight per cent. of the capital employed in the business during the standard period.

of the capital employed in the business unless the Central Board of Revenue is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed and that the relief, if any, afforded by the Board of Referees under sub-section (3) of Section 6 is inadequate.

(2) Without prejudice to the generality of the provisions of sub-section (1) the Central Board of Revenue shall, in considering the making of a direction under that sub-section, have regard to the following circumstances, namely:—

(a) that the capital employed in a business commenced on or after the 1st day of December, 1938, is so small in relation to the volume of the activities of the business that to compute the standard profits in accordance with the provisions of Section 6 would be inequitable, taking into account the normal

of the average amount of the capital employed in the business which the Central Board of Revenue is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed and that the relief, if any, afforded by the Board of Referees under sub-section (3) of Section 6 is inadequate.

(2) Without prejudice to the generality of the provisions of sub-section (1) the Central Board of Revenue shall, in considering the making of a direction under that sub-section, have regard to the following circumstances, namely:—

(a) that the capital employed in a business commenced on or after the 1st day of July, 1938, is so small in relation to the volume of the activities of the business that to compute the standard profits in accordance with the provisions of Section 6 would be inequitable, taking into account the

*profits made in similar businesses;

(b) that owing to the nature of the business heavy expenditure by way of preliminary expenses or expenses in connection with experimental or development work has been incurred in accounting periods closely preceding the chargeable accounting period and that during the chargeable accounting period such expenditure would normally fall to be written off wholly or partly in the books of the person chargeable to excess profits tax.

normal profits made in similar businesses;

(b) that owing to the nature of the business heavy expenditure by way of preliminary expenses or expenses in connection with experimental or development work has been incurred in accounting periods closely preceding the chargeable accounting period and that during the chargeable accounting period such expenditure would normally fall to be written off wholly or partly in the books of the person chargeable to excess profits tax;

(c) that the business is of a pioneer nature, that is to say, is concerned with an industrial process or a form of manufacture or production not undertaken in British India before the 1st day of April, 1932, and has not been in existence long enough to have

paid income-tax for the previous year as determined for the purpose of the income-tax assessment for the year beginning on the 1st day of April, 1937.

(3) If the Central Board of Revenue is satisfied that the computation in accordance with the provisions of Schedule I of the profits of a business during any chargeable accounting period would be inequitable, owing to any of the following circumstances, namely :—

- (a) any postponement or suspension, as a consequence of the present hostilities, of renewals or repairs, or
- (b) the provision of buildings, plant or machinery which will not be required for the purposes of the business after the termination of the present hostilities, or
- (c) difficulties in bringing into British India income arising

(3) If the Central Board of Revenue is satisfied that the computation in accordance with the provisions of Schedule I of the profits of a business during any chargeable accounting period would be inequitable, owing to either of the following circumstances, namely :—

- (a) any postponement or suspension, as a consequence of the present hostilities, of renewals or repairs, or
 - (b) the provision of buildings, plant or machinery which will not be required for the purposes of the business after the termination of the present hostilities,
- the Central Board of Revenue may direct that such allowances shall be

made in computing the profits of the business' during that chargeable accounting period as the Central Board of Revenue thinks just :

outside British India where the country in which the income accrued prohibits or restricts by its laws the remittance of money to British India, and loss in the remittance to British India of such income because of fluctuations in the rate of exchange between that country and British India ;

the Central Board of Revenue may direct that such allowances shall be made in computing the profits of the business during that chargeable accounting period as the Central Board of Revenue thinks just :

Provided that in making such direction the Central Board of Revenue may impose such conditions as it deems appropriate.

Provided that in making such direction the Central Board of Revenue may impose such conditions as it deems appropriate.

Power to make rules.

26. (1) The Central Board of Revenue may, subject to the control of the Central Government, make rules for carrying out the purposes of this Act.

Power to make rules.

27. (1) The Central Board of Revenue may, subject to the control of the Central Government, make rules for carrying out the purposes of this Act.

Power to make rules.

27. (1) The Central Board of Revenue may, subject to the control of the Central Government, make rules for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe the procedure to be followed on appeals and on applications for refunds :

(b) provide for the adaptation to excess profits tax of any of the provisions of the Indian Income-tax Act, 1922, which are made applicable to excess profits tax by Section 20; or of any rules made under any such provision ;

(c) provide for any matter which by, or under, this Act is to be prescribed.

(2) Without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe the procedure to be followed on appeals, applications for rectification of mistakes, and applications for refunds ;

(b) provide for the adaptation to excess profits tax of any of the provisions of the Indian Income-tax Act, 1922, which are made applicable to excess profits tax by Section 21 ; or of any rules made under any such provision ;

(c) provide in regard to companies whose business consists wholly or mainly in the dealing in or holding of investments for the granting of exemption or relief from liability to excess profits tax of profits derived from investments in other companies the profits of which

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(a) prescribe the procedure to be followed on appeals, applications for rectification of mistakes, and applications for refunds ;

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(c) provide in regard to companies whose business consists wholly or mainly in the dealing in or holding of investments for the granting of exemption or relief from liability to excess profits tax of profits derived from investments in other companies the

<p>profits of which have been subjected to excess profits tax in British India ;</p>	<p>(d) provide for any matter which by, or under, this Act is to be prescribed.</p>	<p>(3) The power to make rules conferred by this Section shall be exercised in like manner as the power to make rules under Section 59 of the Indian Income-tax Act, 1922.</p>	<p>SCHEDULE 1. [SEE SECTION 2 (19).]</p>	<p><i>Rules for the computation of profits for purposes of Excess Profits Tax.</i></p>	<p>1. The profits of a business during the standard period, or during any chargeable accounting period, shall be separately computed, and shall, subject to the provisions of this Schedule, be computed on the principles on which the profits of a business are computed for the purposes of income-tax under Section 10 of the Indian Income-tax</p>
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Act, 1922 :

Act, 1922, or would be so computed if income-tax were chargeable on those profits.

Provided that where the profits during any standard period have already been determined for the purpose of an assessment under the Indian Income-tax Act, 1922, such profits as so determined shall, subject to the adjustments required by this Schedule, be taken as the profits during that period for the purposes of excess profits tax :

Provided further that where a standard period or chargeable accounting period is not an accounting period, the profits or losses of the business during any accounting periods wholly or partly included within the standard period or chargeable accounting period shall be so computed as aforesaid, and such division and apportionment to specific periods of those profits or losses and such aggregation of those profits and losses, or any apportioned part thereof shall be made as appears necessary to arrive at the profit during

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the standard period or chargeable accounting period: and any such apportionment shall be made in proportion to the number of months or fractions of months in the respective periods unless the Excess Profits Tax Officer, having regard to any special circumstances, otherwise directs.

2. No allowance shall be made for any loss other than a loss sustained in a business to which this Act applies, or for any loss other than a loss made in the accounting period, and in particular, the principle of allowing any loss sustained in any period to be carried forward and set off against the profits of any other period, or of adding the allowance for depreciation for any one period to the allowance for depreciation for any subsequent period and deeming it to be part of the allowance for such subsequent period shall not be followed.

3. (1) Income received from investments shall be included in the profits in the cases and to the extent provided in sub-rules (2) and (3) of this rule

during the standard period or chargeable accounting period: and any such apportionment shall be made in proportion to the number of months or fractions of months in the respective periods unless the Excess Profits Tax Officer, having regard to any special circumstances, otherwise directs.

2. The profits of a business during the standard period shall be computed on the same basis and in the same manner as the profits of that business are under the Indian Income-tax Act, 1922, as amended by the Indian Income-tax (Amendment) Act, 1939, computed for the chargeable accounting period, notwithstanding that the Indian Income-tax (Amendment) Act, 1939, may not have been in force in the standard period.

3. (1) The principle of adding the allowance for depreciation for any one period to the allowance for depreciation for any subsequent period and deeming

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3. (1) The principle of adding the allowance for depreciation for any one period to the allowance for depreciation for any subsequent period and

deeming it to be part of the allowance for such subsequent period shall not be followed.

(2) No allowance shall be made for any loss other than a loss sustained in a business to which this Act applies.

(3) Nothing in this Act shall be construed as permitting the application, in computing profits for the purposes of the excess profits tax, of the provisions of sub-section (2) of Section 24 of the Indian Income-tax Act, 1922.

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and not otherwise.

(2) In the case of the business of a building society, or of a money-lending business, banking business, insurance business or business consisting wholly or mainly in the dealing in or holding of investments, the profits shall include all income received from investments, whether or not such income is included in the profits charged under Section 10 of the Indian Income-tax Act, 1922, or is charged under any other Section of that Act, or has been subjected to deduction of tax at source or is free of or exempt from income-tax.

(3) In the case of a business which consists wholly or partly in the letting out of property on hire, the income from the property shall be included in the profits of the business whether or not it has been charged to income-tax under Section 9 of the Indian Income-tax Act, 1922, or under any other Section of that Act.

(4) Where the person carrying on a business is the beneficial owner of any investments, the income from which is by virtue of the provisions of this rule not to be taken into account in computing the profits of the business, and a deduction would, apart from the provisions of this rule, fall to be made in respect of interest on borrowed money, the deduction (if any) to be made in respect of that interest shall be computed as if the principal of the borrowed money were reduced by the value of those investments :

Provided that where the person carrying on the business is not a company, no such reduction shall be deemed to be made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and interest thereon.

4. No deduction shall be made on account of liability to pay, or payment of, income-tax, super-tax, or excess profits tax.

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(3) Notwithstanding anything contained in sub-rule (2), where the profits of a subsidiary company are under the provisions of Section 9 to be included in the profits of the principal company for the purposes of assessment to excess profits tax, dividends from the subsidiary company out of such profits shall not also be included in the profits of the principal company.

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(2) In the case of the business of a building society, or of a money-lending business, banking business, insurance business or business consisting wholly or mainly in the dealing in or holding of investments, the profits shall include all income received from investments, whether or not such income is included in the profits charged under Section 10 of the Indian Income-tax Act, 1922, or is charged under any other Section of that Act, or has been subjected to deduction of tax at source or is free of or exempt from income-tax.

(3) Notwithstanding anything contained in sub-rule (2), where the profits of a subsidiary company are under the provisions of Section 9 to be included in the profits of the principal company for the purposes of assessment to excess profits tax, dividends from the subsidiary company out of such profits shall not also be included in the profits of the principal company.

(4) In the case of a business which consists wholly or partly in the letting out of property on hire, the income from the property shall be included in the profits of the business whether or not it has been charged to income-tax under Section 9 of the Indian Income-tax Act, 1922, or under any other Section of that Act.

(5) Where the person carrying on a business is the beneficial owner of any investments, the income from which by virtue of the provisions of this rule not to be taken into account in computing the profits of the business, and a deduction would, apart from the provisions of this rule, fall to be made in respect of interest on borrowed money, the deduction (if any) to be made in respect of that interest shall be computed as if the principal of the borrowed money were reduced by the value of those investments :

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(5) Where the person carrying on a business is the beneficial owner of any investments, the income from which is by virtue of the provisions of this rule not to be taken into account in computing the profits of the business, and a deduction would, apart from the provisions of this rule, fall to be made in respect of interest on borrowed money, the deduction (if any) to be made in respect of that interest shall be computed as if the principal of the borrowed money were reduced by the value of those investments :

Provided that where the person carrying on the business is not a company, no such reduction shall be deemed to be made in the principal of

any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and interest thereon.

5. If at any time after the close of the standard period, any increase in the capital employed in a business has been effected by means of a loan from a bank carrying on a *bona fide* banking business or by means of a public issue of debentures secured on the property of the company, the interest on so much of the loan or debentures as has been utilised in effecting the increase in the capital shall not be deducted in computing the profits for the purposes of excess profits tax and, notwithstanding the provisions of rule 2 of Schedule II, that amount of such loan or debentures shall not be deducted in arriving at the amount of the capital employed in the business.

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3. (1) In the case of a business carried on, in any accounting period which constitutes or includes a chargeable accounting period, by a company the directors whereof have a controlling interest therein,—

(a) if the standard profits of the company are computed by reference to the profits during a standard period, no deduction shall be allowed in respect of directors' remuneration in excess of the amount paid for directors' remuneration in respect of the standard period or, if the standard period is longer or shorter than the accounting period, in excess of a sum which bears to the sum paid for directors' remuneration in respect of the standard period the same proportion as

the length of the accounting period bears to that of the standard period ;

(b) if the standard profits are not computed by reference to the profits during a standard period, no deduction shall be allowed in respect of directors' remuneration.

(2) In this rule the expression "directors' remuneration" does not include the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through the medium of other companies or by any other indirect means, to control, more than five per cent. of the ordinary share capital of the company.

6. Where the performance of a contract extends beyond the accounting period, there shall (unless the Excess Profits Tax Officer, owing to any special

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circumstances, otherwise directs) be attributed to the accounting period such proportion of the entire profits or loss which has resulted, or which it is estimated will result, from the complete performance of the contract as is properly attributable to the accounting period, having regard to the extent to which the contract as performed therein.

7. (1) In the case of a business carried on, in any accounting period which constitutes or includes a chargeable accounting period, by a company the directors whereof have a controlling interest therein,—

(a) if the standard profits of the company are computed by reference to the profits during a standard period, no deduction shall be allowed in respect of directors' remuneration in excess of the amount paid for directors' remuneration in respect of the standard period or, if the standard period is

7. (1) In the case of a business carried on, in any accounting period which constitutes or includes a chargeable accounting period, by a company the directors whereof have a controlling interest therein,—

(a) if the standard profits of the company are computed by reference to the profits during a standard period, no deduction shall be allowed in respect of directors' remuneration in excess of the amount paid for directors' remuneration in respect of the standard period or, if the standard period is

longer or shorter than the accounting period, in excess of a sum which bears to the sum paid for directors' remuneration in respect of the standard period the same proportion as the length of the accounting period bears to that of the standard period ;

(b) if the standard profits are not computed by reference to the profits during a standard period, no deduction shall be allowed in respect of directors' remuneration.

(2) In this rule the expression "directors' remuneration" does not include—

(a) the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through

longer or shorter than the accounting period, in excess of a sum which bears to the sum paid for directors' remuneration in respect of the standard period the same proportion as the length of the accounting period bears to that of the standard period ;

(b) if the standard profits are not computed by reference to the profits during a standard period, no deduction shall be allowed in respect of directors' remuneration.

(2) In this rule the expression "directors' remuneration" does not include—

(a) the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through

the medium of other companies or by any other indirect means, to control, more than five per cent of the ordinary share capital of the company, or

the medium of other companies or by any other indirect means, to control, more than five per cent. of the ordinary share capital of the company, or

(b) the remuneration of any managing agent where such remuneration is included in the profits of the managing agent's business for the purposes of excess profits tax.

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8. In the case of a business carried on by a company, if the standard profits of the company are computed by reference to the profits during a standard period, no deduction shall be allowed in respect of remuneration paid to a managing agent in excess of the amount which would have been payable to that managing agent if the agreement in force in the standard period had been in force in the chargeable accounting period.

8. In the case of a business carried on by a company, if the standard profits of the company are computed by reference to the profits during a standard period, no deduction shall be allowed in respect of remuneration paid to a managing agent in excess of the amount which would have been payable to that managing agent if the agreement in force in the standard period had been in force in the chargeable accounting period, except where such remuneration is subjected to excess profits tax in the hands of the managing agent.

9. Where the performance of a contract extends beyond the accounting period, there shall (unless the Excess Profits Tax Officer, owing to any special circumstances, otherwise directs) be attributed to the accounting period such proportion of the entire profits or loss which has resulted, or which it is estimated will result, from the complete performance of the contract as is properly attributable to the accounting period, having regard to the extent to which the contract was performed therein :

Provided that when any such contract has been completed and the profits have been finally ascertained, if the aggregate of the amounts attributed to previous accounting periods exceeds the profits, as finally ascertained, from the complete performance of the contract, an adjustment shall be made to reduce the amounts so attributed to the various chargeable accounting periods to the amount of the profits as finally ascertained.

9. Where the performance of a contract extends beyond the accounting period, there shall (unless the Excess Profits Tax Officer, owing to any special circumstances, otherwise directs) be attributed to the accounting period such proportion of the entire profits or loss which has resulted, or which it is estimated will result, from the complete performance of the contract as is properly attributable to the accounting period, having regard to the extent to which the contract was performed therein :

Provided that when any such contract has been completed and the profits have been finally ascertained, if the aggregate of the amounts attributed to previous accounting periods exceeds the profit, as finally ascertained, from the complete performance of the contract, an adjustment shall be made to reduce the amounts so attributed to the various chargeable accounting periods to the amount of the profits as finally ascertained.

10. In respect of any building erected on or after the 1st day of September, 1939, which during any chargeable accounting period has ceased to be required for the purposes of the business or has been sold, any amount by which the value of the building at the date when it ceased to be required for the purposes of the business or the price obtained for the building, as the case may be, falls short of the written down value of the building shall be allowed as a deduction in arriving at the profits of that chargeable accounting period.

SCHEDULE II.

[SEE SECTION 2 (3).]

Rules for computing the average amount of capital.

1. (1) Subject to the provisions of this Schedule, the average amount of the capital employed in a business (so far as it does not consist of money) shall be taken to be—

(a) so far as it consists of assets

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SCHEDULE II.

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1. (1) Subject to the provisions of this Schedule, the average amount of the capital employed in a business (so far as it does not consist of money) shall be taken to be—

(a) so far as it consists of assets

- acquired by purchase on or after the commencement of the business, the price at which those assets were acquired, subject to the deductions hereafter specified ;
- (b) so far as it consists of assets being debts due to the person carrying on the business, the nominal amount of those debts, subject to the said deductions ;
- (c) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the business, subject to the said deductions.
- (2) The price or value of any assets other than a debt shall be subject to such deductions for depreciation as are necessary to reduce the asset to its written down value as defined in Section 2 of this Act, and, in the case of a debt, the nominal amount of the debt
- acquired by purchase on or after the commencement of the business, the price at which those assets were acquired, subject to the deductions hereafter specified ;
- (b) so far as it consists of assets being debts due to the person carrying on the business, the nominal amount of those debts, subject to the said deductions ;
- (c) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the business, subject to the said deductions.
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- (c) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the business, subject to the said deductions.
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shall be subject to any deduction which has been allowed in respect thereof for income-tax purposes.

(3) Where the price of any asset has been satisfied otherwise than in cash, the then value of the consideration actually given for the asset shall be treated as the price at which the asset was acquired.

2. (1) Any borrowed money and debts shall be deducted, and in particular any debt for income-tax or super-tax or for excess profits tax in respect of the business shall be deducted:

Provided that any such debt for income-tax or super-tax or excess profits tax shall, for the purposes of this Schedule, be deemed to have become due—

(a) in the case of income-tax and super tax, on the last day of the period of time within which the tax is payable under Section 45 of the Indian

debt shall be subject to any deduction which has been allowed in respect thereof for income-tax purposes.

(3) Where the price of any asset has been satisfied otherwise than in cash, the then value of the consideration actually given for the asset shall be treated as the price at which the asset was acquired.

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Provided that any such debt for income-tax or super-tax or excess profits tax shall, for the purposes of this Schedule, be deemed to have become due—

(a) in the case of income-tax and super-tax, on the last day of the period of time within which the tax is payable under Section 45 of the Indian

Income-tax Act, 1922;

(b) in the case of excess profits tax, on the first day after the end of the chargeable accounting period in respect of which the tax is assessable notwithstanding that the excess profits tax may not have been assessed until after that date.

(2) Where any debt for the excess profits tax assessable in respect of any period is to be deducted under this rule, the amount thereof shall not be reduced as the result of any relief to be given in respect of a deficiency of profits occurring in any subsequent period, and the amount of any such relief shall be treated as having become an asset of the business on the first day after the end of the chargeable accounting period in which the deficiency occurred.

3. Any investments the income from which is by virtue of the provisions of the First Schedule not to be taken into account in computing the

Income-tax Act, 1922;

(b) in the case of excess profits tax, on the first day after the end of the chargeable accounting period in respect of which the tax is assessable notwithstanding that the excess profits tax may not have been assessed until after that date.

(2) Where any debt for the excess profits tax assessable in respect of any period is to be deducted under this rule, the amount thereof shall not be reduced as the result of any relief to be given in respect of a deficiency of profits occurring in any subsequent period, and the amount of any such relief shall be treated as having become an asset of the business on the first day after the end of the chargeable accounting period in which the deficiency occurred.

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profits of the business, and any moneys not required for the purposes of the business, shall be left out of account, but where any investments in the beneficial ownership of the person carrying on the business are so left out of account, the sum (if any) to be deducted under the last preceding rule in respect of borrowed money shall be computed as if the principal of the borrowed money were reduced by the value of those investments :

Provided that where the person carrying on the business is not a company, no reduction shall be deemed to be made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and the interest thereon.

4. For the purpose of ascertaining the average amount of capital employed in a business during any period, the profits or losses made in that period shall, except so far as the contrary is shown, be deemed—

profits of the business, and any moneys not required for the purposes of the business, shall be left out of account, but where any investments in the beneficial ownership of the person carrying on the business are so left out of account, the sum (if any) to be deducted under the last preceding rule in respect of borrowed money shall be computed as if the principal of the borrowed money were reduced by the value of those investments :

Provided that where the person carrying on the business is not a company, no reduction shall be deemed to be made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and the interest thereon.

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Provided that where the person carrying on the business is not a company, no reduction shall be deemed to be made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and the interest thereon.

4. Notwithstanding anything contained in rule 3, in the case of the business of shipping to which this Act applies, the sale proceeds of any tonnage sold or the amount of compensation in respect of loss of ships or the amount

(a) to have accrued at an even rate throughout the period; and

(b) to have resulted, as they accrued, in a corresponding increase or decrease, as the case may be, in the capital employed in the business.

5. Where, in accordance with the second proviso of Section 5 of this Act, this Act is applicable to part only of a business, the capital employed in that part shall be computed separately from any other capital of the person carrying on the business, and all references to capital employed in a business shall be construed as references to capital employed in that part of the business only.

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of accumulation of reserves, whether invested or not, shall be taken into account in computing the average amount of capital employed in such business:

Provided that any income received from investment of such funds shall be included in computing profits for purposes of the excess profits tax.

5. For the purpose of ascertaining the average amount of capital employed in a business during any period, the profits or losses made in that period shall, except so far as the contrary is shown, be deemed—

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SCHEDULE III.

[SEE SECTION 9 (7).]

Rules for determining the amount of capital held by a company through other companies.

1. Where, in the case of a number of companies, the first directly owns ordinary share capital of the second and the second directly owns ordinary share capital of the third, then, for the purposes of this Schedule, the first shall be deemed to own ordinary share capital on the third through the second and, if the third directly owns ordinary share capital of a fourth, the first shall be deemed to own ordinary share capital of the fourth through the second and third, and the second shall

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2. In this Schedule—

(a) any number of companies of which the first directly owns ordinary share capital of the next and the next directly owns ordinary share capital of the next but one and so on, and, if they are more than three, any three or more of them, are referred to as "a series";

(b) in any series—

(i) that company which owns ordinary share capital of another through the remainder is referred to as "the first owner";

(ii) that other company the ordinary share capital of which is so owned is referred to as "the last owned company";

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(iii) the remainder, if one only, is referred to as an "intermediary" or, if more than one, is referred to as a "chain of intermediaries";

(c) a company in a series which directly owns ordinary share capital of another company in the series is referred to as an "owner";

(d) any two companies in a series of which one owns ordinary share capital of the other directly, and not through one or more of the other companies in the series, are referred to as being directly related to one another.

3. Where every owner in a series owns the whole of the ordinary share capital of the company to which it is directly related, the first owner shall be deemed to own through the intermediary of chain of intermediaries the

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4. Where one of the owners in a series owns a fraction of the ordinary share capital of the company to which it is directly related, and every other owner in the series owns the whole of the ordinary share capital of the company to which it is directly related, the first owner shall be deemed to own that fraction of the ordinary share capital of the last owned company through the intermediary or chain of intermediaries.

5. Where—

(a) each of two or more of the owners in a series owns a fraction, and every other owner in the series owns the whole, of the ordinary share capital of the company to which it is directly related ; or

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